

# INDIANA LAW REVIEW

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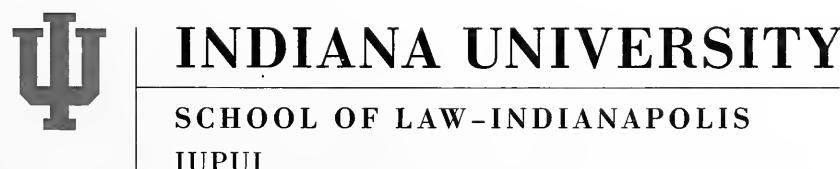
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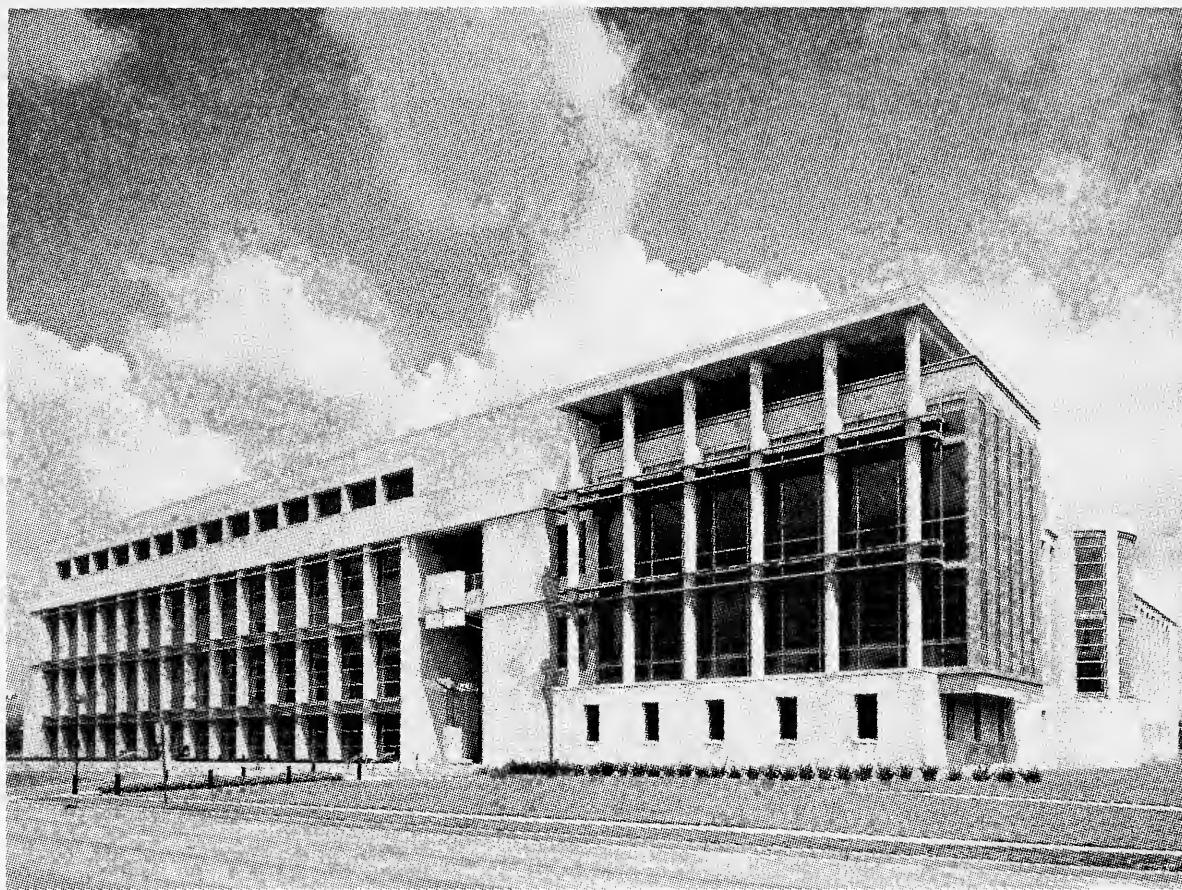
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### INTRODUCTION: A SYMPOSIUM ON THE LAW OF DEMOCRACY

MICHAEL J. PITTS\*

The first decade of the twenty-first century has come to a close, and it has certainly been an interesting one for the rapidly maturing field of election law. The new century commenced with what might be described as the “big bang” of election law—the drama of *Bush v. Gore*.<sup>1</sup> *Bush v. Gore* looms large for at least a couple of reasons. First, the case put an exclamation point on the growth in the constitutionalization of election law.<sup>2</sup> Second, the events in Florida during the 2000 election created what now amounts to a third recognized subfield of election law—election administration—to accompany the other already prominent subfields of voting rights and campaign finance.

Beyond *Bush v. Gore*, the first decade of the new century also brought a wave of judicial decisions and statutory shifts. Sticking with election administration for a moment, 2002 saw enactment of the Help America Vote Act (HAVA)<sup>3</sup> as a reaction to the events surrounding the hotly disputed 2000 election. The HAVA introduced the concepts of statewide voter registration databases and provisional ballots to the entire country while also taking aim at improving the mechanisms (i.e., machinery) that voters use to cast ballots. The HAVA, in turn, spawned new thinking about election administration by the states, with several adopting controversial provisions requiring registered voters to present government-issued photo identification as a condition of casting a countable ballot.<sup>4</sup> Indeed, Indiana was one of the states that passed such a law, and a subsequent equal protection challenge to Indiana’s law ultimately worked its way to the United States Supreme Court in *Crawford v. Marion County Election Board*.<sup>5</sup> Moreover, the federal government’s work in election administration was not limited to passage of the HAVA. In 2009, Congress passed the Military and Overseas Voter Empowerment Act (MOVE),<sup>6</sup> representing yet another landmark in the

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1. 531 U.S. 98 (2000).

2. See generally Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55-83 (2004).

3. Pub. L. No. 107-252, 116 Stat. 1666 (2002).

4. Senate Enrolled Act No. 438, Pub. L. No. 109, 2005 Ind. Acts p.2005.

5. 553 U.S. 181 (2008).

6. Pub. L. No. 111-84, 123 Stat. 2190 (2009).

continuing effort to fully enfranchise military and overseas voters.

The voting rights sphere was equally as active. As always, the Supreme Court issued a number of decisions interpreting the statutory framework found in the Voting Rights Act. At the beginning of the decade, the Court rendered opinions in *Reno v. Bossier Parish School Board*<sup>7</sup> and *Georgia v. Ashcroft*<sup>8</sup> that limited the application of the Section 5 preclearance provision. Congress, however, legislatively reversed both of these judicial decisions in 2006 by amending Section 5 while also extending the preclearance provision for another twenty-five years.<sup>9</sup> That same year, the Court for the first time in two decades found a violation of the Section 2 “results” test in the context of Texas’s wild post-2000 redistricting battles.<sup>10</sup> Yet by the end of the decade, the Court had returned to its more skeptical view of the Voting Rights Act. In *Bartlett v. Strickland*,<sup>11</sup> the Court limited the application of Section 2. And in *Northwest Austin Municipal Utility District No. One v. Holder*,<sup>12</sup> the Court interpreted Section 5 in a novel manner to expand the ability of local governments to escape the preclearance requirement while simultaneously using extensive dicta to call into question the constitutionality of Congress’s 2006 extension of the preclearance regime.

Like voting rights, the area of campaign finance also witnessed an extensive conversation between Congress and the Court about regulation and its constitutional limits. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA)<sup>13</sup> as a means of limiting the influence of money in elections. At first, the Court was deferential to the new regulations, upholding several important provisions of the BCRA in *McConnell v. Federal Election Commission*.<sup>14</sup> But a shift in the Court that traded Chief Justice William Rehnquist and Justice Sandra Day O’Connor for Chief Justice John Roberts and Justice Samuel Alito resulted in what appears to be a major transformation of the Court’s views on campaign finance regulation. In a series of decisions in the last half of the decade from *FEC v. Wisconsin Right to Life, Inc.*<sup>15</sup> to *Davis v. FEC*<sup>16</sup> to *Citizens United v. FEC*,<sup>17</sup> the Court rolled back on its deferential posture and demonstrated a far greater willingness both to limit the scope of campaign finance regulations and to strike them down in their entirety.

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7. 528 U.S. 320 (2000).

8. 539 U.S. 461 (2003).

9. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C.).

10. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

11. 129 S. Ct. 1231 (2009).

12. 129 S. Ct. 2504 (2009).

13. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 42 U.S.C.).

14. 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

15. 551 U.S. 449 (2007).

16. 128 S. Ct. 2759 (2008).

17. 130 S. Ct. 876 (2010).

It was with many of these events in mind when thirteen law professors gathered on April 8 and 9, 2010, at Indiana University School of Law—Indianapolis to discuss the past, present, and future of the law of democracy. In front of a large audience (thus signifying the tremendous public interest in these issues), these prominent legal academics explained, critiqued, and advocated for change in the areas of election administration, voting rights, and campaign finance. The discussion that commenced on those days now continues in this volume with nine articles certain to inform future debate related to the law of democracy. What follows here, then, is a brief description of the contents of this volume.

Even a decade later, the 2000 presidential election still lingers in the minds of many, and a couple of articles in this volume use that election as a launching point for discussion of where election administration needs to go. Edward Foley notes how that election and the decision in *Bush v. Gore* exposed a critical weakness in that the United States Constitution does not create an institution for resolving disputed elections. Professor Foley then sets out to answer the question of why the Founders did not provide for such an institution. His answer is that the Founders had no experience in resolving disputed elections for executive positions; after all, their primary experience with executive power had been a king. Moreover, when confronted with such a dispute during the New York gubernatorial election in 1792, the Founders were at a loss for answers about how to resolve the dispute. Professor Foley then digs deep into the history of that 1792 election—focusing on the views of such luminaries as Hamilton, Jefferson, Madison, and Jay—for lessons that might help us today.

Nathaniel Persily uses *Bush v. Gore* as a means of pointing out what the rest of the world might learn from our experience in terms of election administration. After recounting the litany of problems (e.g., voter registration and ballot design) during Florida 2000, Professor Persily identifies several election administration goals that reformers around the world should try to meet, including accurately capturing the preferences of those who cast ballots, widespread participation, and public confidence in the administration of elections. Professor Persily then, importantly, discusses the need to measure whether those values are being met.

Daniel Tokaji tackles a different issue that has moved to the forefront following *Bush v. Gore* and passage of the HAVA: in what situations should there be a private right of action to sue for violations of federal election statutes? Professor Tokaji notes how in recent years the Supreme Court has curtailed private enforcement of federal statutes. While not necessarily quibbling with the Court's overall doctrinal shift, Professor Tokaji does take issue with the application of the doctrine in the context of federal election statutes. He argues that the Court needs to shift its doctrine and allow greater access for private litigants to the courts because of the vital role federal courts play in overseeing elections.

Angelo Ancheta provides a bridge between election administration and voting rights. His piece focuses on the laws aimed at assisting voters who are members of language-minority groups in casting ballots by providing things like registration materials and ballots in languages other than English. At the federal level, these requirements are embodied in certain provisions of the Voting Rights

Act. Professor Ancheta, however, demonstrates the inadequacy of federal laws and, importantly, shifts the focus to state and local government activity designed to foster participation among language-minority voters. In doing so, he identifies several conditions under which state and local governments have adopted laws and procedures in the absence of an explicit federal mandate. Even more importantly, he shows how the goals of local laws aimed at ballot access for language-minority groups do not reflect a response to past discrimination but rather reflect a desire to foster civic participation.

Kareem Crayton focuses on another integral provision of the Voting Rights Act: the preclearance requirement embodied in Section 5. That provision requires certain state and local governments to get preapproval for any change they wish to make to their election laws in order to prevent the implementation of changes that would discriminate against racial and ethnic minority voters. Taking a cue from recent academic and Supreme Court skepticism about the efficacy of Section 5 in the twenty-first century, Professor Crayton thinks that Section 5 needs to be reinvented in order to solve a number of the “pathologies” that have developed over the years as a result of the preclearance provision. In designing that reinvention, Professor Crayton thinks there would be great utility in looking for guidance from another reinvention effort—the Reinventing Government initiative undertaken by President William Jefferson Clinton’s administration. In the end, what Professor Crayton suggests is an alternate framework that helps establish a set of metrics for determining when a jurisdiction has achieved the goals of the preclearance process.

While developments in the last decade related to election administration and voting rights generated substantial discussion at the symposium, the event that may have loomed largest was the ground-breaking decision in *Citizens United v. FEC*. In that case, a majority of the Supreme Court held that corporations had the constitutional right to make independent expenditures in federal elections. Three of the authors in this volume focused on the ramifications that case will have for the future of campaign finance regulation.

Michael Kang sees *Citizens United* as potentially being the most important campaign finance decision in decades due to the Court’s narrowing of the government interest in campaign finance regulation. For many years the Rehnquist Court had been fairly deferential to campaign finance regulation, subtly expanding the government interest in enacting those regulations. In contrast, Professor Kang views *Citizens United* as a move to narrow the government interest to quid pro quo corruption as the sole grounds upon which campaign finance regulation may rest. Professor Kang then examines how this narrowing of the government interest may impact other areas of campaign finance regulation, including restrictions on “soft money.”

Lloyd Hitoshi Mayer provides insight into a less-noticed aspect of the *Citizens United* decision—the Court’s 8-1 vote to uphold regulations requiring corporations to disclose their donors. Professor Mayer identifies the policy and constitutional debate over disclosure as a fight between those who support disclosure because it makes for a more informed electorate and those who oppose disclosure because it can chill speech by opening the door to retaliation against publicly-identified donors. Professor Mayer points out, however, that neither side

has a great deal of evidence to support its claims of the benefits or burdens of disclosure. In the absence of compelling evidence, Professor Mayer makes some suggestions for improving the disclosure scheme.

Allison Hayward examines *Citizens United* but also focuses more broadly on the recent increased scrutiny the Supreme Court has given to campaign finance regulations in contexts apart from union and corporate spending. In essence, what Professor Hayward focuses on might be termed the “nuts-and-bolts” aspects of campaign finance regulations. What she sees is a need for existing campaign finance regulations to accommodate the recent jurisprudential shift in areas ranging from limits on spending by candidates, to limits on contributions to candidates, to limits on spending by foreign nationals. In the end, she calls on Congress to re-evaluate the campaign finance regulations to make them simpler, clearer, and less burdensome.

The capstone of this volume, though, is Heather Gerken’s call to arms for election law academics. Tears for Fears once sang, “Everybody wants to rule the world.”<sup>18</sup> Professor Gerken has slightly more modest goals for the field of election law; she’d be pleased if election law ruled constitutional law. Put a bit less vividly, Professor Gerken thinks that some of the dynamic, structuralist, institutional thinking in which election law scholars engage should become a key part of the dialogue in other areas of constitutional law, such as equal protection and executive power. What her article and, indeed, the other articles in this volume demonstrate is that election law has matured in a way that might have been unimaginable prior to this decade. Professor Gerken is most certainly onto something when she says that the time has come for election law to export its contributions to other realms.

Beyond the individual contributors to this volume mentioned above,<sup>19</sup> there are many people who deserve praise for bringing this symposium volume to fruition. First, the entire staff of the *Indiana Law Review*—the “troops on the ground”—engaged in an amazing effort to make the trains run on time both during the live event held in April 2010 and in editing this volume in the months that followed. Those troops, though, needed leadership. On this score, Ann Harris Smith and Daniel Pulliam did a superb job of seizing the reins for coordinating the live event during the 2009-2010 academic year before handing things off to Sara Benson and Kate Mercer-Lawson, who worked tirelessly during the summer and fall of 2010 to put the finishing touches on this written volume. In the end, this volume of articles is in many ways a tribute to their diligence.

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18. TEARS FOR FEARS, *Everybody Wants to Rule the World*, on SONGS FROM THE BIG CHAIR (Phonogram Records 1985).

19. In addition, Professors Adam Cox, Gilda Daniels, Jim Greiner, and Franita Tolson graciously participated in the “live” portion of the symposium.



# KEYNOTE ADDRESS: WHAT ELECTION LAW HAS TO SAY TO CONSTITUTIONAL LAW

HEATHER K. GERKEN\*

## INTRODUCTION

This Address briefly reexamines the relationship between election law and constitutional law. For those unfamiliar with the history of this relationship, allow me to offer a tongue-in-cheek sketch. Election law is a young field. It was not formally declared its own field of study until 1999,<sup>1</sup> though its roots date back earlier. While there were a handful of scholars writing systematically about the subject before 1990,<sup>2</sup> the field came into its own during the early 1990s as a group of dynamic young scholars entered the field and made a name for themselves.

In the early days, election law looked a bit like a faraway outpost of constitutional law. Constitutional law dominated our collective imagination, and many in the field dutifully translated the pristine mandates of equal protection and the First Amendment into the Wild West atmosphere that we call politics. Much was made of the relationship between the Supreme Court's affirmative action discourse and its racial gerrymandering decisions, or the Court's campaign finance decisions and the rest of the First Amendment.

Eventually, election law scholars declared their independence from constitutional law in a bloodless revolution. Building on the early and prescient work of Rick Pildes and several others,<sup>3</sup> election law scholars—myself

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1. Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999); see also Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999) (“no one can seriously question whether election law is a subject in its own right”).

2. Dan Lowenstein was the leading example. For accounts of Lowenstein’s early contributions, see Symposium, *The Past, the Present, and the Future of Election Law: A Symposium Honoring the Works of Daniel Hays Lowenstein* (Jan. 29, 2010), <http://www.law.ucla.edu/home/Calendar/Detail.aspx?recordid=4398>.

3. See, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 1-3 (1998); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1754-55 (1999); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1837 (1992); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202-04 (1996); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2506-09 (1997) [hereinafter Pildes, *Principled Limitations*]; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805-08 (1999); see also sources cited *infra* note 20 (collecting sources from the *Shaw* literature).

included—insisted that there was something special about the regulation of politics that required a different type of jurisprudence.<sup>4</sup> Scholars insisted that constitutional mandates could not be witlessly applied across domains. As Pamela Karlan correctly predicted, election law was “leaving constitutional law’s empire.”<sup>5</sup> Some of the intellectual work was done during the 1990s by election law scholars reacting to the *Shaw* cases.<sup>6</sup> *Bush v. Gore*<sup>7</sup> provided an additional push in that direction because the case attracted top constitutional law scholars to the newly developed field. The fact that the best constitutional law scholars in the country were suddenly writing within the field was a signal of the field’s legitimacy and prestige. But, in a typical example of “boundary policing,”<sup>8</sup> scholars who had mastered election law’s details sometimes thought that mainstream constitutional law scholars were missing what made election law distinctive.

Our formal Declaration of Independence was Rick Pildes’s 2004 Harvard Foreword.<sup>9</sup> Even as democratic politics have become “constitutionalized,” declared Pildes, constitutional law simply lacked an appropriate framework for regulating politics.<sup>10</sup> He argued that “[c]onstitutional lawyers are trained to think in terms of rights and equality” whereas “politics involves, at its core, . . . the organization of power.”<sup>11</sup> He thus insisted that even though the Supreme Court’s election law jurisprudence was anchored in the Constitution, it should leave behind “[u]nderstandings of rights or equality worked out in other domains of constitutional law” because they were simply a bad fit for the regulation of politics.<sup>12</sup>

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4. See, e.g., Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 B.U. L. REV. 737 (2002). Some scholars remain skeptical of the idea, however. See, e.g., Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 381-83 (2004) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR TO BUSH V. GORE* (2003)); Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515-17 (2003).

5. Pamela S. Karlan, *Constitutional Law, The Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1187 (1999). Karlan was equally prescient, in my view, when she insisted that “[i]t would be unfortunate for everyone concerned if legal regulation of the political process were to hive off completely from constitutional law and the two bodies were to evolve separately to the point where there is little possibility of continued cross-fertilization.” *Id.* at 1188.

6. See *infra* notes 20-26 and accompanying text.

7. 531 U.S. 98 (2000).

8. I borrow the idea from Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87-88 (1997).

9. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes, *Foreword*].

10. *Id.* at 39. For an empirical account of the dramatic increase in election litigation, see Richard L. Hasen, *Introduction: Developments in Election Law*, 42 LOY. L.A. L. REV. 565 (2009).

11. Pildes, *Foreword*, *supra* note 9, at 40.

12. *Id.*

The notion of election law’s exceptionalism has by now become conventional wisdom among scholars in the field. We understand ourselves to be an independent intellectual terrain, not a mere constitutional law outpost. If scholars are divided between lumpers and splitters—those who see connections across subject areas and those who think contextual differences matter most—then we have written about the relationship between election law and constitutional law largely in the cadence of the splitter.

I want to call for a bit more lumping. That is not because I disagree with the notion that mainstream constitutional theory translates unevenly into the field of politics. To the contrary, I firmly believe in election law’s exceptionalism. But I think that portions of constitutional law are exceptional as well. Much of constitutional law, after all, involves “the organization of power.”<sup>13</sup> There may be more opportunities for intellectual arbitrage than people have typically imagined.

Put more bombastically, during the next stage of the field’s development, I think we ought to have imperial aims.<sup>14</sup> Election law scholars should do more than declare our independence from constitutional law; we should colonize it. There are lessons to be drawn from election law, sensibilities that permeate the field that are not as prevalent elsewhere, a distinctive perspective that might help reframe conventional constitutional law debates. Election law scholars, for instance, tend to focus on groups and aggregation rather than on individuals and rights, which are the conventional topics of inquiry for most constitutional law scholars.<sup>15</sup> Both constitutional law and election law are concerned with the fate of the “discrete and insular minorities” of *Carolene Products*’s Footnote Four.<sup>16</sup> But election law scholars devote a good deal more attention than their constitutional law counterparts to the democracy-reinforcement prong of *Carolene Products*’s famous footnote. And unlike their constitutional law counterparts, election law scholars spend a good deal of time thinking about the relationship *between* Footnote Four’s two prongs—between democracy reinforcement and the fate of discrete and insular minorities. They have even imagined that political empowerment plays as important a role as judicially enforceable rights in promoting equality. Similarly, election law scholars tend to view governments through the lens of politics. They thus eschew the type of formal accounts of state actors we see in much of constitutional law. Instead, election law scholars imagine institutions as a collection of political actors, something that pushes them to look beyond institutional roles and to treat a

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13. *Id.*

14. I hope readers will forgive the territorial analogy. I had thought to begin with Rick Hasen’s observation that election law has two “very different parents, constitutional law and political science.” Hasen, *supra* note 1, at 1095. Just play out the metaphor, though, and you will realize that the Oedipal implications are just a bit too much for a respectable law review.

15. Perhaps this is to our detriment. See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. (forthcoming 2011).

16. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

governing body as a “they,” not an “it.”<sup>17</sup>

I do not want to make the foolish claim that election law scholars have a monopoly over the insights and sensibilities described below. But these insights and sensibilities constitute the dominant melody in election law, while elsewhere they tend to sound as a minor theme. For that reason, perhaps it is time to translate election law’s insights into the domain of constitutional law. Here, I will offer several examples of what this might look like in practice.

## I. ELECTION LAW AND EQUAL PROTECTION

My first example is equal protection. As with traditional constitutional law, the question of racial equality has dominated much of the debate within the field. But election law scholars have developed a distinctive set of insights about equality and identity, many of which may be relevant to conventional constitutional law debates. Here, then, I will try to give you a sense of what the election law empire building might look like going forward.<sup>18</sup> In my view, the key insight that election law affords us is that the path to equality does not move straight from civil inclusion to full integration, but instead requires an intermediary stage: political empowerment.<sup>19</sup>

### A. Race and Politics

During the last two decades of intense litigation over the constitutionality of the Voting Rights Act and the districts it has produced, election law scholars have regularly pointed out that Fourteenth Amendment mandates should not be mindlessly applied to the arena of politics.<sup>20</sup> Many of these arguments were developed in response to the Supreme Court’s *Shaw* jurisprudence, where the Court struck down bizarrely shaped majority-minority districts for being unduly race-conscious, condemning them as “segregate[d]” and a form of “political

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17. See *infra* text accompanying notes 54-61. The reference, of course, is to Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

18. Empire building in this area has become an academic obsession of mine. See, e.g., Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) [hereinafter Gerken, *Domains of Equal Protection*]; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second-Order DiversityThe Foreword: Federalism All the Way Down*, 123 HARV. L. REV. (forthcoming 2010) [hereinafter Gerken, *Federalism All the Way Down*].

19. See Gerken, *Federalism All the Way Down*, *supra* note 18.

20. See generally T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harms in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245; Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993); Pildes, *Principled Limitations*, *supra* note 3.

apartheid.”<sup>21</sup>

Scholars challenged the Court’s decision to import conventional equal protection analysis into the districting context by arguing that politics is different and thereby building the case for election law’s exceptionalism. The most interesting arguments centered on the ways in which majority-minority districts might have dynamically integrative effects, furthering rather than undermining the long-term goals of the Fourteenth Amendment. Without delving into the merits of the arguments, let me give you three examples of the kinds of arguments scholars have made in their efforts to distinguish race-conscious districting from the other forms of race-conscious decisionmaking.

The first example goes to the material benefits associated with majority-minority districts. Many scholars have argued that having the representatives of racial minorities at the political table to lend their “voice” or “perspective” results in more enlightened laws. But election scholars have drawn upon a more muscular conception of the role that minority representation plays in politics.

Pamela Karlan and Samuel Issacharoff, for instance, have argued that economic progress for African-Americans has turned not on the vindication of civil rights (the conventional model in constitutional law), but on business set-asides, affirmative action, and government employment.<sup>22</sup> In their view, those programs came about precisely because blacks and Latinos were able to elect their candidates of choice in districts drawn in a race-conscious fashion. “[T]he creation of a black middle class,” they write, “has depended on the vigilance of a black political class.”<sup>23</sup> One might even argue that this is the story of integration for white ethnics as well, as Justice Souter argued in his dissent in *Bush v. Vera*, another voting rights case.<sup>24</sup> In Souter’s view, the Lithuanian and Polish wards in Chicago and the Irish and Italian political machines in Boston helped integrate ethnic groups into the system.<sup>25</sup> In his words, it “allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics and to attain a level of political power in American democracy,” something that ultimately “cooled” ethnicity’s “talismanic force.”<sup>26</sup>

Note the relationship between political power and integration on this view. Political power did not just facilitate economic integration. Politics exerted a gravitational pull on outsiders, bringing them into politics and making them feel part of it. Majority-minority districts gave racial minorities (and before them, white ethnics) a stake in the system. It afforded them the status of insiders even as it recognized their distinctive outsider identities.

The second argument is mostly mine.<sup>27</sup> Building on the work of Pamela

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21. *Shaw v. Reno*, 509 U.S. 630, 647, 658 (1993).

22. Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 49 (2003).

23. *Id.*

24. *Bush v. Vera*, 517 U.S. 952, 1054 (1996) (Souter, J., dissenting).

25. *Id.* at 1060.

26. *Id.* at 1074-75 (citations omitted).

27. See Gerken, *Second-Order Diversity*, *supra* note 18.

Karlan<sup>28</sup> as well as Anne Phillips's observation that "[p]olitics is not just about self-interest, but also about self-image,"<sup>29</sup> I have argued that majority-minority districts might generate constitutive and expressive benefits that further the integrative ideal—that power and identity might be more closely tied than we typically assume. The grand insight of the Voting Rights Act, in my view, is that creating statistically "integrated" districts would relentlessly reproduce in every district the same inequalities racial minorities experience almost everywhere else. Majority-minority districts, in contrast, turn the tables, allowing the usual losers to win and the usual winners to lose. Where voting is racially polarized—where whites and non-whites consistently prefer different candidates at the polls—creating districts that mirror the underlying statewide population would condemn racial minorities to lose (or, at best, to influence) every contest. Majority-minority districts give racial minorities a chance to enjoy the same type of participatory experience—the sense of efficacy or agency associated with being in charge—that is usually reserved for members of the majority. It is not difficult to imagine why racial minorities would desire a chance to be in charge for reasons that have nothing to do with political outcomes or the distribution of tangible goods. If racial minorities have a sense that members of the majority have been able to elect a champion, someone fighting on their behalf, they might relish the chance to elect a champion of their own for purely dignitary reasons.

Michael Kang suggests that majority-minority districts may be integrative in a third, even more counterintuitive, fashion.<sup>30</sup> He argues that such districts ultimately reduce racial bloc voting because they temporarily pull race out of the political discussion and thereby help fracture, rather than reify, racial categories—just the opposite of most predictions.<sup>31</sup> Kang points out that where voting is racially polarized, racial minorities have every incentive to vote monolithically, as that is their only hope of electing a candidate of choice. The result, writes Kang, is that race becomes a "conversation stopper" as "[p]olitics . . . freeze along the historically dominant axis of race, removing incentives for political leaders to challenge the public with new choices and understandings inconsistent with the entrenched racial alignment."<sup>32</sup>

Kang argues that the solution to this problem is majority-minority districts.<sup>33</sup> In such districts, Kang points out, it is all but a given that the candidate of choice for the minority group will win the general election. As a result, minority voters

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28. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. Rev. 289, 307 (1997) (targeting majority-black districts but not majority-white districts suggests that "whites somehow are injured by being placed in racially integrated settings in which they do not constitute the dominant group"); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. Chi. Legal F. 83, 94-95 (suggesting that Shaw grew out of a fear of "the prospect of African-American control").

29. ANNE PHILLIPS, THE POLITICS OF PRESENCE 79 (1995).

30. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008).

31. *Id.* at 787.

32. *Id.* at 778.

33. *Id.* at 778-84.

can enjoy the luxury of division and debate during the primary.<sup>34</sup> Rather than coalescing behind a single candidate, racial minorities are able to engage in the usual stuff of pluralist politics, something that will in the long run break down racial categories. Majority-minority districts, then, create not just statistically integrated legislatures, but a genuinely integrated polity.

All three of these arguments grew out of the peculiar sensibility of election scholars.<sup>35</sup> As Karlan has observed, the dominant story about race told in constitutional law circles depicts racial minorities as “objects of judicial solicitude, rather than as efficacious political actors in their own right.”<sup>36</sup> Constitutional law scholars often tell precisely that story when they are talking about race and elections. For instance, they fold majority-minority districts into whatever variant of that conventional story they prefer. Liberals tend to view majority-minority districts as a race-conscious strategy for integrating the legislature, much as they view affirmative action as a strategy for integrating universities. Conservatives generally see them as yet another example of what they think of as hand-outs, akin to affirmative action or minority business set-asides.

Election law scholars, in sharp contrast, see majority-minority districting as a tool of empowerment, something that pushes society toward a deeper, more robust form of racial integration. Election law scholars are not imposing a vision of race on politics; they are imposing a vision of politics on race. They see racial minorities as they see other groups in the political system—as “efficacious political actors” rather than “objects of judicial solicitude”—and thus tell a distinctive story about race and districting.<sup>37</sup> Karlan and Issacharoff’s electoral tale does exactly that, showing the ways that political empowerment allows racial minorities to protect themselves instead of looking to the courts for protection. Similarly, the notion of “turning the tables” suggests that racial minorities need not be protected from the rough-and-tumble of politics to succeed; they simply need the same type of voting power that whites routinely enjoy.

While many constitutional law scholars argue that race is a semi-fluid category,<sup>38</sup> shaped by interactions between individuals and the world around them, they can be exasperatingly vague about which institutional mechanisms shape racial identity and how. For scholars of the political process, thinking

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34. See *id.* at 798.

35. The next two paragraphs draw upon Gerken, *Domains of Equal Protection*, *supra* note 18.

36. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

37. *Id.*

38. See, e.g., K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 78–80 (1996); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 38, 48 (Wendy Brown & Janet Halley eds., 2002); see also MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 50–51 (1997); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 99 (2000); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 183–91 (1990).

about the relationship between institutions and identity seems to come more naturally. The notion of “turning the tables,” for instance, requires us to think of identity formation in the context of actual institutional arrangements—where there are a consistent set of winners and losers—rather than imagining it solely in individual or group-based terms. Accordingly, Kang’s work on districts and racial identity draws upon substantial political science work about the way elections make questions salient and frame issues for voters. Because election scholars are familiar with the gravitational pull power exerts on outsiders, the role that politics plays in driving a debate, and the ways in which power and identity connect in the context of politics and governance, they have been able to leverage those insights in order to offer a distinctive view on racial equality.

Lest you think that election scholars have invoked election law’s exceptionalism only to muster arguments in favor of majority-minority districts, consider the work on the other side of this debate. For example, precisely because districts are drawn to elect a legislature, election law scholars are exquisitely aware of the trade-offs involved in race-conscious districting. Rick Pildes and Sam Issacharoff, for instance, have repeatedly argued that majority-minority districts can pack minority (and, often, Democratic) voters and thereby reduce the power racial minorities wield at the legislative level.<sup>39</sup> They argue that because representatives of racial minorities have favored reducing the percentage of black and Latino voters in a district, as in *Georgia v. Ashcroft*,<sup>40</sup> courts should not second-guess those political deals in the name of equality but instead should let members of those groups do what other groups do in a healthy democracy: negotiate the best political deal possible.<sup>41</sup>

Note that even while Pildes and Issacharoff take a different policy position than others in the field, their argument exhibits substantial continuity with the arguments above. It turns on a vision of equality that involves empowering racial minorities to protect themselves rather than turning to the courts for assistance.<sup>42</sup>

### B. Empire Building and Equality

So now we turn to the possibility of empire building. Although election law scholars have written about this concept in the context of political regulation, their insights are relevant to conventional constitutional law analysis as well. These insights may not translate directly; context does matter, after all. But at the very least this work raises a set of questions worth exploring in constitutional

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39. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1716-20 (2004); Pildes, *Foreword*, *supra* note 9, at 88-99.

40. 539 U.S. 461, 469-70 (2003) (“as the black voting age population in a district increase[s] beyond what [is] necessary [to elect officials of choice] . . . you diminish the power of African-Americans overall”). Making the case for the other side is Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

41. See Issacharoff, *supra* note 39, at 1728.

42. For further analysis, see Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006).

law. After all, electoral districts are not the only place where racial minorities dominate. They will sometimes constitute majorities on city councils, school boards, juries, and the like. But while majority-dominated electoral districts are a widely accepted strategy for promoting integration in the electoral context, the opposite is true in most of constitutional law.<sup>43</sup> Indeed, setting federalism aside, we do not have an account about the benefits of minority rule for the institutions where racial minorities have some chance of ruling (institutions that are smaller than states, which are generally too big for racial minorities to dominate). To the contrary, we generally treat local institutions dominated by racial minorities with suspicion, something that matters a great deal for how constitutional law regulates them. It seems to me that introducing the sensibilities of election scholars to the questions of minority governance in constitutional law might provide a usefully fresh perspective. At the very least, it might help us develop a more coherent account of whether minority-dominated governance matters in those other areas and why.

Our skepticism about minority-dominated institutions outside of federalism runs so deep that it is inscribed in our very vocabulary. We have a firm sense of what “integration” or “diversity” looks like—we value institutions that look like the community from which they are drawn, that “look like America,” to use Bill Clinton’s favorite phrase. We thus use the term “diversity” to describe decision-making bodies that statistically mirror the underlying population—if blacks are twenty-five percent of the population, they should be twenty-five percent of the decision-making body—and often deem institutions “integrated” even when they contain only a token number of minorities. As a result of the talismanic significance of *Brown*,<sup>44</sup> we are deeply skeptical of institutions that depart from this vision of integration. When racial minorities constitute statistical majorities in an institution, we often call those institutions “segregated” and condemn them as such.

Consider, for instance, the Court’s race jurisprudence. In *City of Richmond v. J.A. Croson Co.*,<sup>45</sup> the Court relied on the great John Hart Ely to hold that a minority set-aside program was *more* constitutionally suspect because it had been enacted by a black-majority city council.<sup>46</sup> Lest you think only the colorblindness camp views minority-dominated institutions with hostility, keep in mind the terminology used by every Justice who wrote in the recent school desegregation case, *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>47</sup> They all condemned heterogeneous schools where minorities dominated as “segregated.”

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43. For further exploration, see Gerken, *Domains of Equal Protection*, *supra* note 18; Gerken, *Federalism All the Way Down*, *supra* note 18; Gerken, *Second-Order Diversity*, *supra* note 18. The next few paragraphs that follow are drawn from Gerken, *Federalism All the Way Down*, *supra* note 18.

44. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

45. 488 U.S. 469 (1989).

46. *Id.* at 495-96.

47. 551 U.S. 701 (2007).

Setting aside the merits of these decisions, it is odd that we so quickly affix the dreaded label “segregation” to institutions where racial minorities dominate. Critical distinctions get lost when we cast these issues as debates about integration versus segregation. The most obvious is that these institutions may be different from the racial enclaves of Jim Crow. The less obvious is that viewed through the lens of election law, we might imagine these institutions as sites for empowering racial minorities rather than oppressing them, for integrating racial minorities rather than segregating them.

You might wonder, of course, why anyone would quarrel with the notion that democratic bodies should “look like America” unless, of course, you happen to be an election law scholar. As members of my academic tribe would be quick to point out, the oddity of this theory for “empowering” racial minorities is that it relentlessly reproduces the same inequalities on governance bodies that racial minorities experience nearly everywhere else. It is as if we imagine that the path of integration moves straight from civic inclusion to full integration. We miss the possibility that there is an intermediary stage along the path to integration: political empowerment.<sup>48</sup>

It should be possible to believe in, even revere, the work of the Civil Rights Movement and still wonder about these questions. Civic inclusion was the hardest fight. But it turns out that discrimination is a protean monster and more resistant to change than one might think. It may require new, even unexpected tools before we reach genuine integration. As a voting rights scholar, I find it hard not to imagine political empowerment being one of those tools.

If we place minority-dominated institutions in the same category as majority-minority districts, it is possible to imagine all three of the arguments that have been used to support majority-minority districts being applied to mainstream constitutional law. We can start with the material benefits associated with racial empowerment—the Karlan and Issacharoff argument that success of the black middle class has depended on the vigilance of the black political class. Now think about *Croson*, where the black-majority city council in Richmond created a minority set-aside program, only to have it struck down by the Court for violating the Fourteenth Amendment.<sup>49</sup> If we imagined cities as sites of minority empowerment, however, we might recast the debate over *Croson* much as Issacharoff and Karlan recast the debate over majority-minority electoral districts. It would push us toward a more rough-and-tumble vision of equality than the rights model, one that recognizes the dignity in groups protecting themselves rather than looking to the courts for solace. It would also buttress Justice Marshall’s dissent, which observed that if anyone were familiar with the existence of past discrimination and the need for remedying its present effects, it would be the representatives of the black community in Richmond, the former capital of the Confederacy.<sup>50</sup>

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48. For a fuller exploration of the ideas in the next few paragraphs, see Gerken, *Federalism All the Way Down*, *supra* note 18.

49. *Croson*, 488 U.S. at 477-78, 511.

50. *Id.* at 528-29 (Marshall, J., dissenting).

We could just as easily imagine the other arguments election law scholars have made in the districting context applying outside of elections. We might value governing bodies which turn the tables, allowing blacks and Latinos to enjoy the same sense of efficacy—and deal with the same types of problems—as the usual members of the majority. These institutions would give racial minorities the opportunity to stand in the shoes of the majority. Racial minorities would have a chance to forge a consensus and fend off dissenters, to get something done and compromise more than they would like. Similarly, if Kang’s insights apply elsewhere, we might imagine it would be useful to have institutions where blacks and Latinos can spend their time debating the usual stuff of pluralist politics.<sup>51</sup> Or, consistent with the insights of Pildes and Issacharoff, we might think that the influence and control trade-offs that can exist in the elections context exist for other nested governing structures as well.<sup>52</sup> All of these arguments may be relevant to ongoing debates about race and governance in the context of mainstream constitutional law, but they have yet to be fully explored by mainstream constitutional law scholars.

## II. INTELLECTUAL ARBITRAGE ON THE STRUCTURAL SIDE OF CONSTITUTIONAL LAW

Let me give you a few more, necessarily stylized, examples of areas where the sensibilities of an election law scholar might prove useful in the context of constitutional law.<sup>53</sup> Here I will turn from the rights-side of the Constitution to the structural-side and discuss some of the arguments election law scholars could bring to bear on mainstream constitutional debates surrounding the separation of powers and federalism. In each instance, viewing these debates through the lens of politics and partisan competition has usefully complicated the discussion. Here again, while election law scholars certainly do not have exclusive access to these ideas, they so dominate the field that they seem likely to frame our understandings of the debates that dominate conventional constitutional law going forward. Indeed, while no author discussed below has self-consciously cast himself as translating election law’s insights into constitutional law, a fair amount of empire building has already occurred in these areas.

### A. Reframing Separation of Powers and Federalism

When constitutional scholars talk about the horizontal and vertical diffusion of powers, they typically think in institutional terms. Separation of powers scholars, for instance, talk about the relationship between Congress and the President. Federalism scholars talk about the relationship between the federal

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51. For efforts to apply this argument elsewhere, see Gerken, *Domains of Equal Protection*, *supra* note 18; Gerken, *Second-Order Diversity*, *supra* note 18.

52. See, e.g., Gerken, *Second-Order Diversity*, *supra* note 18, at 1124-42 (making this argument).

53. Here again, I will set aside the merits of individual arguments and simply focus on representative types of ideas that election law scholars might bring to bear on these debates.

government and the states. Much of this scholarship displays a formalist bent; it tends to treat these institutions as if they were unitary actors with static identities across time.

Election law scholars tend to view these institutions differently. Indeed, it is rare to find a formal conception of the state anywhere in election law scholarship. That is because election law scholars see the problem of political lock-up everywhere. Recognizing that political actors do not shed party identities when they take office, election law scholars have long viewed governance as a site for pursuing partisan interests, even as a staging ground for national debates. As a result, election law scholars have long thought that “the State” is best understood as “a constellation of currently existing political and partisan forces.”<sup>54</sup>

Some of the most interesting work in constitutional law has applied this insight to conventional constitutional law debates. Daryl Levinson and Richard Pildes’s article, *Separation of Parties, Not Powers*,<sup>55</sup> is a fine example. The authors argue that it is a mistake to assume that the separation of powers, standing alone, will ensure the Madisonian goal that ambition be made to counter ambition.<sup>56</sup> In our age of cohesive national parties, they argue, Congress and the Presidency must be controlled by different parties for the separation of powers doctrine to have real teeth. Or consider Pildes’s claim—again, deeply informed by his attentiveness to political incentives—that while most separation of powers scholars tend to worry about congressional overreaching, the more serious threat is “the problem of political abdication.”<sup>57</sup>

Federalism doctrine has been a particularly fertile target for applying the insights of election law to mainstream constitutional law. For instance, Larry Kramer was able to reconceptualize the political safeguards of federalism precisely because he was so attentive to the role political parties play in integrating state and national politics. Recognizing that the states and the federal government are not unitary, but are instead an agglomeration of a variety of political forces, Kramer devoted two pieces to showing that one of the most important safeguards of state power is the influence state and national officials have on one another by virtue of their shared party membership.<sup>58</sup> Or consider Ernie Young’s work analogizing state governments to the “shadow governments” found in European systems—sites for the party out of power at the national level

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54. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653 (1998).

55. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) [hereinafter Levinson, *Empire-Building*].

56. See THE FEDERALIST NO. 51, at 320 (James Madison) (John C. Hamilton ed., 1888).

57. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 148 (2007).

58. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

to build its “farm team” and develop competing policy objectives.<sup>59</sup> Finally, consider Daryl Levinson’s counterintuitive account of the political incentives that govern state-federal interactions.<sup>60</sup> These and other examples suggest the many ways in which the overlay of politics can complicate existing scholarship on government institutions.<sup>61</sup>

### B. *The Constitution During Times of Emergency*

Here is another example, one drawn from the recent debate over constitutional law during times of emergency. As I noted above, election law scholars tend to think of individual rights in structural terms, and they devote as much time to the second prong of the *Carolene Products* footnote as to the third. Issacharoff and Pildes, who were first to argue that election law cases should be analyzed through a structural rather than a rights-based lens,<sup>62</sup> have recently applied that insight to a long-standing debate over the enforcement of constitutional rights during times of emergency. Although the rights-structure debate has occurred in many areas of constitutional law,<sup>63</sup> constitutional lawyers who have focused on the Constitution during times of trouble have typically rotated around three positions, all of which reflected their rights-oriented sensibilities. The first was the civil libertarian position—that the Constitution applies in undiluted form whether or not there is an emergency.<sup>64</sup> The second is that the Constitution is flexible enough to accommodate wartime activities, a

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59. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285-87 (2004).

60. Levinson, *Empire-Building*, *supra* note 55, at 938-46.

61. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 499-504 (1991) (discussing the role states play in monitoring federal officials and training the loyal opposition); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 137-38 (2001); Vicki C. Jackson, *Federalism and the Uses and Limits of Law, Printz and Principle?*, 111 HARV. L. REV. 2180, 2221-23 (1998) (noting the usefulness of “direct[ing] political activism and organizing” the states precisely because their borders do not map exactly on to divisive political identities); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 386-88 (depicting local power as a “counterbalance” to political lock-up at the federal level); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (recognizing the role the local actor plays in promoting international rights and transnational cooperation). This work has also helped scholars move in a comparative direction. See, e.g., Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

62. Issacharoff & Pildes, *supra* note 54, at 646-48.

63. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 231-83 (1998); Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

64. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

position famously articulated by Justice Frankfurter.<sup>65</sup> On this view, constitutional rights are judicially enforced during times of emergency, but they are enforced in a more flexible fashion.<sup>66</sup> The third, offered by Justice Jackson, is the view that although the President would inevitably transgress constitutional mandates, the Constitution should not bless those transgressions for fear that such judicial decisions would wind up diluting constitutional rights during peacetime.<sup>67</sup> Even if all of these arguments were in some sense about constitutional structure, they remained firmly anchored to a rights-based model.

Pildes and Issacharoff offered something quite different. Speaking in the cadence of election scholars, they offered an institutional account of how the Constitution should work during times of emergency, one that put meat on the bones of Justice Jackson's famous tripartite framework in the *Steel Seizure* case.<sup>68</sup> During times of crisis, they argued, courts should police second-order questions of who decides, not first-order questions involving rights and substance.<sup>69</sup> Thus, for instance, Pildes and Issacharoff argued that courts ought to make the classic move of John Hart Ely<sup>70</sup>—whose ideas continue to dominate the field of election law—and issue democracy-forcing decisions that push the democratic branches (particularly Congress) to act rather than rely on the Court to enforce substantive rights. The goal is the same: to protect individual liberties and place sensible limitations on executive power. But the means they advocated were strikingly different; they depended on an institutional solution rather than a rights-based one. Perhaps it is unsurprising that election scholars, with their institutional sensibilities and attentiveness to the relationship between formal law and informal politics, were the ones to make the most sustained argument in this area.

### C. The Mismatch Problem

Let me offer one final example of the type of intellectual arbitrage that might occur if election law scholars wrote more about constitutional law. Election law scholars are acutely aware of the problem of the low-information voter; it is an idea that dominates political science and heavily influences our own work. Much of our work thus deals with a variant of what David Schleicher calls the “mismatch problem,”<sup>71</sup> which arises when we ask voters to perform a

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65. *Korematsu v. United States*, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring).

66. *Id.*

67. *Id.* at 242-48 (Jackson, J., dissenting).

68. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

69. *Id.* at 8.

70. See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

71. David Schleicher, *What if Europe Held an Election and No One Cared?* 2-11 (George Mason Univ. Law & Econ., Research Paper No. 09-68, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1525015](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525015). It is worth noting that Schleicher’s terminology covers

constitutional role without the tools they need to do so. Mismatches typically occur when voters lack the right kind of shorthand to make sensible decisions about ongoing policy debates. I have done some work on how this problem connects to the bread-and-butter election law questions,<sup>72</sup> as have scholars like David Schleicher,<sup>73</sup> Michael Kang,<sup>74</sup> Elizabeth Garrett,<sup>75</sup> and Nathaniel Persily and his co-conspirators Steve Ansolabehere and Joshua Fougere.<sup>76</sup>

In some senses, this scholarship is of a piece with the scholarship I just described. It recognizes that just as we cannot understand “the State” or “Congress” without the lens of politics, so too must we think about the institutional and political structures that frame issues for voters before we are confident that we know what “the People” think.

The problem of the low-information voter pops up in many places in constitutional law.<sup>77</sup> For instance, think about the accountability argument that the Supreme Court found so appealing in several of its most recent federalism decisions, those prohibiting the federal government from “commandeering” state officials and requiring them to carry out federal law. The Court was worried that commandeering would blur the lines of accountability, making it hard for voters to know which government was responsible for which policy.<sup>78</sup> Any election scholar worth her salt would have immediately questioned this kind of argument.

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problems other than the one I describe here.

72. See HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009); Heather K. Gerken & Douglas B. Rand, *Creating Better Heuristics in the Presidential Nominating Process: Why a Citizens Assembly Beats out Iowa and New Hampshire*, 125 POL. SCI. Q. (forthcoming 2010).

73. Schleicher, *supra* note 71; see also David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).

74. Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003).

75. See, e.g., Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 VA. L. REV. 1533 (1999); Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003); see also Elizabeth Garrett & Matthew D. McCubbins, *Faith in Reason: Voter Competence and Local Bond Propositions* (USC Keston Inst. for Pub. Finance and Infrastructure Policy, Research Paper No. 07-01, 2007), available at <http://www.usc.edu/schools/sppd/keston/pdf/20070130-faith-in-reason.pdf>.

76. Joshua Fougere et al., *Partisanship, Public Opinion, and Redistricting*, in RACE, REFORM, AND REGULATION OF THE POLITICAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Charles et al. eds., 2010).

77. Ilya Somin is one of the rare constitutional law scholars to write in this vein. See, e.g., Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255 (2006); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004); Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY. L. REV. 595 (2003).

78. Printz v. United States, 521 U.S. 898, 929-30 (1997); New York v. United States, 505 U.S. 144, 168-69 (1992).

We all know that political accountability depends largely on voters' reliance on broadly defined partisan heuristics, not fine-grained policy judgments. Thus, as Neil Siegel and others have concluded, while high-information voters should be able to figure out which government is responsible for what, low-information voters "may be largely beyond judicial or political help on the accountability front."<sup>79</sup>

### CONCLUSION

Nothing in this paper is meant to imply that election law scholars have a monopoly on these insights; such a statement would be flatly untrue and inconsistent with some of my own examples. But election law scholars are united by a similar sensibility and attracted to a similar set of questions. It may be easier for us to recognize certain kinds of recurring puzzles about the allocation of power, the relationship between formal and informal structures, and the connection between identity and institutions. Think about the first example with which I began. As I noted above, most constitutional law scholars instinctively fold the story of race in the electoral domain into the familiar story they tell about race in constitutional law.<sup>80</sup> Election law scholars do the opposite—they instinctively fold the story of race into their story about the electoral domain. And by focusing on the elections domain rather than on race per se, they end up telling a distinctive tale about equal protection, one that may have resonance outside of that domain.

The examples I offer here suggest that the same may be true of constitutional law more generally. So, returning to my earlier theme, let me close by suggesting that perhaps it is time for the field of election law—which has traveled from a constitutional law outpost to an independent intellectual terrain—to contemplate a bit of empire building of its own.

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79. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2006).

80. See *supra* text accompanying notes 38-42.

# THE FOUNDERS' *BUSH V. GORE*: THE 1792 ELECTION DISPUTE AND ITS CONTINUING RELEVANCE

EDWARD B. FOLEY\*

## INTRODUCTION: THE GAP IN OUR CONSTITUTIONAL ARCHITECTURE

The 2000 presidential election re-exposed a critical weakness in the Constitution's procedures for determining the winner of the presidency when the outcome is disputed. The Constitution says only that, with both houses of Congress present, the Vice President of the United States (acting as president of the Senate) shall open the certificates of the Electoral College votes sent from the states, "and the votes shall then be counted."<sup>1</sup> Using the passive voice, this clause suggests, without specifying clearly, that the Vice President holds the authority to resolve any dispute over counting the Electoral College votes from the states.<sup>2</sup> Yet the Vice President may well be one of the competing candidates seeking the office of the presidency, as Al Gore was in 2000, and it is an obvious conflict of interest to give this individual the authority to decide the dispute.

This indeterminate constitutional clause, however, offers no obvious alternative. Do the two houses of Congress vote together as a single combined body, a procedure not contemplated elsewhere in the Constitution and, to my knowledge, unheard of in the practices that have unfolded since the Founding? Surely, the Framers of the Constitution would have spelled out this unusual procedure with a bit more specificity if that is what they had in mind. Yet suppose the two houses vote separately, as is the regular practice with Congress. What if the two houses are split on the issue in dispute? The question of which candidate won the presidency is not like a piece of legislation, which can die unenacted if the two houses do not agree. The nation needs to inaugurate its newly elected President—all the more so since the President's role in protecting national security has inevitably increased in the aftermath of World War II.<sup>3</sup>

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1. U.S. CONST. amend. XII.

2. For an extensive discussion of the problems that this passage in the Twelfth Amendment has caused, see Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

3. For one of many works that discuss the rise of presidential power since World War II,

Thus, the dispute over which candidate won the White House cannot remain deadlocked, with each house of Congress reaching opposite conclusions. Yet the Constitution itself indicates no method of breaking the deadlock other than to give the decision to the Vice President, who may be biased by partisanship even if not one of the candidates.

The nation was forced to confront this acute constitutional weakness once before, in the context of settling the 1876 presidential election between Rutherford B. Hayes and Samuel J. Tilden.<sup>4</sup> There, the two houses were at odds, with the Republican-controlled Senate supporting Hayes and the Democratic-dominated House backing Tilden. In ruling for Hayes, Congress broke the logjam by creating a one-time-only Electoral Commission that split 8-7 along party lines. It took Congress another decade to develop a more permanent solution, the Electoral Count Act of 1887, but even the Act's authors recognized that it was an inadequate substitute for a constitutional amendment to eliminate ambiguity over where the ultimate vote-counting authority lies in a disputed presidential election.<sup>5</sup> During that entire decade, however, Congress could never muster the degree of bipartisan support necessary for a constitutional amendment; thus, it settled for what it feasibly could enact by statute.<sup>6</sup>

The Electoral Count Act was then left to gather dust until 2000, when a fresh look at it demonstrated just how inadequate it was.<sup>7</sup> Assuming it was even possible to comprehend the Act's exasperatingly convoluted passages—no safe assumption at all—it appeared to provide that, in the event of a House-Senate deadlock, the governor of the state from which the dispute arose should settle the matter.<sup>8</sup> Apart from the general dubiousness of this proposition (why, after all, should the political party lucky enough to hold the governorship of the affected state get to prevail simply by virtue of this fact?), the proposition was a particularly awkward prospect in 2000 with Governor Jeb Bush of Florida being the brother of the Republican candidate for President in the disputed election.<sup>9</sup> Additionally, there was no guarantee that a twenty-first-century Congress would attempt to obey the largely indecipherable dictates of a nineteenth-century compromise that was admittedly deficient from the outset. Thus, notwithstanding what was written in the Electoral Count Act, it was possible to predict that the Senate and the House would remain deadlocked over whether Bush or Gore had won heading into Inauguration Day, or beyond, with no mutually accepted tiebreaking mechanism available.

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see GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010).

4. See Colvin & Foley, *supra* note 2, at 502-20 (providing details of this dispute).

5. *Id.* at 519-22.

6. The details of the legislative history leading up to the adoption of the Electoral Count Act are discussed in Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. (forthcoming 2010).

7. Colvin & Foley, *supra* note 2, at 522-25.

8. *Id.* at 522.

9. *See id.*

Into the controversy stepped the U.S. Supreme Court, with the consequence we now know to be *Bush v. Gore*.<sup>10</sup> Whether or not it was a valiant and necessary effort to head off an even worse scenario if the dispute had made it all the way to Congress,<sup>11</sup> this 5-4 ruling—in which all nine Justices appeared to abandon their normal jurisprudential positions in order to reach a result favorable for their preferred presidential candidate, and in which the dissenters accused the majority of illegitimacy that would undermine “the Nation’s confidence in the judge as an impartial guardian of the rule of law”<sup>12</sup>—is hardly the model for how one would wish to handle a dispute of this kind. Would it not be so much better if the Constitution gave us a clearly established tribunal tailored to the particularly tricky task of adjudicating a vote-counting dispute in a presidential election? The tribunal should be designed to be evenly balanced and fair to both sides in order to maximize the chance that the losing side perceives the outcome as legitimate even if incorrect from its viewpoint. Were this constitutionally specified tribunal to exist, the operation of democracy would seem so much more successful and orderly than it would if the U.S. Supreme Court instead asserted a jurisdiction many doubt it has—and then exercised its self-asserted jurisdiction in a way that appeared to reflect the partisan bias of its majority.

Now, a decade after *Bush v. Gore*, the nation is no closer to getting this needed constitutional amendment than it was a decade after the Hayes-Tilden debacle. Whether we are ever able to learn from these experiences remains to be seen. Meanwhile, however, we can ask why the Constitution did not provide us with an appropriate tribunal in the first place. Perhaps if we better understand the causes of the defect, we will become better able to effectuate a remedy.

Some of the explanation for the constitutional deficiency will be familiar. It is well-known, for example, that the Framers did not anticipate how party politics would affect presidential elections.<sup>13</sup> After the Electoral College tie in 1800 between running mates Thomas Jefferson and Aaron Burr, the Twelfth Amendment was necessary to separate Electoral College voting for President and Vice President.<sup>14</sup> But to understand why the Twelfth Amendment did not create a mechanism for resolving the kinds of vote-counting disputes that emerged in 1876 and 2000, it is necessary to dig deeper. An additional part of the explanation lies in the federalist structure of the Constitution and the presidency it established. The Electoral College in each state is an institution of state government, and it is understandable if the Framers (to the extent they thought about it at all) assumed that any disputes over ballots cast for a state’s presidential

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10. 531 U.S. 98 (2000).

11. See generally RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

12. *Bush*, 531 U.S. at 129 (Stevens, J., dissenting).

13. BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 5-6 (2005); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 53 (1969); BERNARD A. WEISBERGER, AMERICA AFIRE 14 (2001).

14. TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC 1787-1804 (1994).

electors would be handled within the state's own governmental apparatus.

Yet federalism did not stop the dispute over Florida's presidential electoral ballots from reaching national institutions in either 1876 or 2000. The Framers, too, were lawyers (or at least many of them were), and they were smart enough to know that a litigant dissatisfied with one tribunal's answer would consider whether to pursue the same matter in a more friendly forum. If they had attended to the possibility of fighting over ballots cast for a state's presidential electors, they could have foreseen that one side would attempt to take the fight to Congress if that side was unhappy with how state government had handled it.

Federalism, therefore, is not a full answer to the question. The truth, instead, is that the Founders were not experienced enough with disputed elections even at the state level. Their inexperience in this respect prevented them from anticipating how to handle a dispute over ballots cast for the office of presidential elector. To be sure, the American colonists had some experience with disputes over elections for seats in colonial legislatures.<sup>15</sup> But disputes over legislative elections were relatively easy to handle; the colonists inherited from England the doctrine that a legislative chamber shall judge the qualifications of its members.<sup>16</sup> An elected executive, however, was another matter, whether the executive was the state's own governor or the nation's President. The Founders could not look to their colonial history for experience on how to handle a dispute over any kind of election for a chief executive.

It would take more space than this Article to explain fully how the Founding Generation responded to the problem of disputed chief executive elections once they confronted them. In the fifty years between the Declaration of Independence and rise of Jacksonian democracy (which essentially coincided with the passing of the Founding Generation), there are several significant disputes to assess. Massachusetts, Pennsylvania, and Delaware all had disputed elections that shed some light on why the Founders left the apparatus of electoral democracy incomplete in this crucial regard.<sup>17</sup>

Still, no episode in this early period is nearly as significant as New York's disputed gubernatorial election of 1792. This episode directly involved some of the Founders most instrumental to the adoption of the U.S. Constitution, including John Jay and Alexander Hamilton (two of the three co-authors of the *Federalist Papers*). This dispute also received national attention at the time, including commentary from Thomas Jefferson and James Madison.<sup>18</sup> Thus, as a window into the thinking of the Founders on what to do when confronted with a major vote-counting dispute, this particular election is unparalleled. If we can understand how and why the Founders were surprised and perturbed that their

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15. See, e.g., MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 135-37 (1943).

16. See generally JOSHUA AARON CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS (2007).

17. These other disputed elections will be discussed in the book that my Moritz colleague Steven Huefner and I are writing on the full history of disputed elections in the United States.

18. See *infra* Part III.D.

own constitutional handiwork failed them at this crucial moment, we will be in a better position to understand why the Founders did not provide for the kind of tribunal needed in 1876 or 2000.

In short, the Founders themselves were sent reeling by their own unexpected version of *Bush v. Gore*. Their own inability to ready themselves for a dispute of this kind helps explain why the nation was unprepared in 2000 when the actual *Bush v. Gore* occurred. Therefore, let us journey back to see what happened when the Founders faced this same kind of dispute. Let us do so in the hope that, by understanding the causes and consequences of their mistakes, we need not repeat them when the next major disputed election arises.

### I. SETTING THE STAGE

The New York gubernatorial election of 1792 was one of the first involving the two-party political competition that emerged in the aftermath of the 1787 Constitutional Convention, despite the Framers' desires to avoid that development.<sup>19</sup> Madison famously had discussed the "mischiefs of faction" in the *Federalist Papers*<sup>20</sup>—and how to avoid a tyranny of "a major[ity] party" through the constitutional separation of powers.<sup>21</sup> But by 1792 Madison himself had come to embrace the idea that he was a member of one political party, the so-called Democratic-Republicans, set in opposition to another.<sup>22</sup> The name of that other party, the Federalists, ironically indicated Madison's rift with his *Federalist Papers* co-authors, Alexander Hamilton and John Jay.

Madison's recognition of two-party competition as emergent by 1792 was not the same as acceptance of two-party competition as a permanent feature of a healthy democracy. On the contrary, Madison believed that his Democratic-Republicans were the true guardians of the liberty won in the Revolution and protected by the Constitution.<sup>23</sup> Conversely, from his perspective, the other party (the Federalists) had betrayed the Revolution and the Constitution. Thus, as he saw it, the task of his Democratic-Republicans was *not* to trade positions with the Federalists as the "legitimate opposition"<sup>24</sup> during the period of electoral competition when the other party inevitably was in power. Rather, his side's task was to permanently destroy the Federalists as enemies of the Constitution and return the Republic to the original situation in which no two-party competition existed.<sup>25</sup>

The Federalists saw their rivals, the Democratic-Republicans, in much the same way. The Alien and Sedition Acts, which came within the first few years

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19. See generally HOFSTADTER, *supra* note 13 (on the Founders' antipathy to party).

20. THE FEDERALIST NO. 10 (James Madison).

21. THE FEDERALIST NO. 51 (James Madison).

22. James Madison, *Parties*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 469 (R. Worthington ed., 1884); see generally ACKERMAN, *supra* note 13; HOFSTADTER, *supra* note 13.

23. HOFSTADTER, *supra* note 13, at 85.

24. *Id.* at 212.

25. *Id.* at 84.

of this new two-party rivalry, prove this point. The political opponents of the Federalists were, in their eyes, seditious enemies of the Republic and its new Constitution.<sup>26</sup>

This early attitude towards the emergence of two-party competition may help to explain why the actors in the 1792 New York drama behaved as they did. They were not ready for the intense political animosity that developed between the two sides, and when the animosity surfaced, there was no desire on either side to adopt institutional structures built on the premise that two-party competition would remain an ongoing feature of elections in their new constitutional democracy. Instead, both sides wanted to win elections, control the government, and perpetuate constitutional institutions that would be consistent with their idea of politics without party competition.

In New York's gubernatorial election of 1792, the incumbent, George Clinton, was the candidate of the newly emerging Democratic-Republican party.<sup>27</sup> His Federalist opponent was the illustrious John Jay, who was then serving as the first Chief Justice of the United States. Jay's willingness to leave that position to become New York's governor signals the relative importance of the two offices at the time—and also indicates that a fight over who won this governorship was comparable to the Founding Generation as a potential fight over the winner of a presidential election.<sup>28</sup> Winning the New York governorship, in other words, was a major prize (it was one of the largest and most economically important of the thirteen original states, and back then, of course, the states had much more power than the federal government). Accordingly, the politicians fought over it with every bit as much intensity as their successors would over 200 years later in *Bush v. Gore*.

The dispute focused on the ballots cast in Otsego County, where Cooperstown (the home of the National Baseball Hall of Fame) is located.<sup>29</sup> If Otsego's ballots were counted, Jay would win by roughly 200 votes.<sup>30</sup> But if not, then Clinton would prevail by about 100 votes.<sup>31</sup> The specific problem involved

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26. *Id.* at 106-07.

27. The main secondary texts on which I have relied are JABEZ DELANO HAMMOND, THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK (Phinney 4th ed. 1850) (1844); ALAN TAYLOR, WILLIAM COOPER'S TOWN (1995); ALFRED F. YOUNG, THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS (1967); Carol Ruth Berkin, The Disputed 1792 Gubernatorial Election in New York (1966) (unpublished M.A. thesis, Columbia University) (on file with Columbia University Archives).

28. See WALTER STAHR, JOHN JAY: FOUNDING FATHER 283 (2005).

29. See JOHN S. JENKINS, HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK 44 (1846).

30. YOUNG, *supra note* 27, at 308. No one could know for sure what Jay's exact total would be, since the ballots had not been counted and would be destroyed without a count of them ever occurring. See *infra* text accompanying notes 53, 152. But given voting patterns in Otsego County at the time, both contemporary observers and subsequent historians have estimated with considerable confidence what the magnitude of Jay's victory would have been.

31. *Id.*

the delivery of the ballots from Otsego County to the secretary of state. New York's election law required the sheriff of each county to be the official responsible for this delivery.

New York's legislature had enacted a statute for regulating elections in 1787, the year of the federal Constitution's adoption. This statute directed that after the polls had closed in each locality, the local election inspectors—what we would call poll workers or precinct officials—would “immediately” enclose and bind with tape the containers holding the ballots.<sup>32</sup> After affixing their seal to the containers, the inspectors were required to appoint one of themselves to deliver “without delay” the sealed containers to the county sheriff.<sup>33</sup> The statute, in turn, required the sheriff to collect all these containers and, without opening any of them, put them all together in one box and to deliver that box, closed and affixed with the sheriff's seal, “into the office of the Secretary of this State.”<sup>34</sup>

The problem with the Otsego ballots is that the outgoing sheriff's term ended on February 18, 1792.<sup>35</sup> In fact, he resigned even earlier, on January 13.<sup>36</sup> His replacement, Benjamin Gilbert, was named on March 30.<sup>37</sup> But Gilbert did not receive his commission until May 11. Thus, as was later determined by the official canvassing committee itself, Gilbert was not “qualified into the office of sheriff” until then.<sup>38</sup>

On May 3, outgoing sheriff Richard Smith, acting as if he still possessed the powers of that office, had deputized another person to deliver the ballots on his behalf to the secretary of state.<sup>39</sup> But a whole month earlier, on April 3, Smith had been elected supervisor of Otsego Township, and under New York law a sheriff could hold no other office. Apparently, Smith was attempting to perform the functions of both offices at the same time when the election took place. In this time period, voting occurred over four days—from April 24 to April 28. On May 1, in his capacity as town supervisor, Smith ruled on challenges to the eligibility of some voters. But then Smith continued to perform the role of sheriff for the purpose of delivering the ballots to the secretary of state. As one historian has vividly put it, “in the most absurd touch, at the end of the polling Smith, acting as supervisor, sealed the Otsego Township ballot box for transfer to the county sheriff; becoming the sheriff, he received that ballot box from himself.”<sup>40</sup>

Because of the legal defects with Smith's status as sheriff, Clinton supporters argued that the ballots from Otsego County had not been delivered to the

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32. Act of Feb. 13, 1787, 1787 N.Y. Laws 32.

33. *Id.*

34. *Id.* at 33.

35. TAYLOR, *supra* note 27, at 178. See *infra* APPENDIX for a timeline of the 1792 election dispute.

36. *Id.*

37. *Id.*

38. MATTHEW L. DAVIS, *MEMOIRS OF AARON BURR: WITH MISCELLANEOUS SELECTIONS FROM HIS CORRESPONDENCE* 335 (1836).

39. TAYLOR, *supra* note 27, at 178.

40. *Id.*

secretary of state in accordance with the requirements of the statute and thus should not be counted. They also complained that the ballots from one town within Otsego County, Cherry Valley, could not be counted because there was a dispute over which of two sets of returns from that town were the correct returns.<sup>41</sup> But this issue was something of a sideshow, as Jay's supporters were prepared to concede that those specific ballots should be discarded, but not the rest from Otsego.<sup>42</sup> There was no challenge to all of the other Otsego ballots for lack of the required seals.<sup>43</sup> The only problem was that the sheriff's seal on the whole box from the county was Smith's. Thus, the fight reverted to the main issue: was Smith entitled to act as the sheriff for purposes of delivering the ballots to the secretary of state—and, if not, must all of the Otsego ballots be discarded for that reason alone?<sup>44</sup>

As the controversy unfolded, the Clintonians suggested—but never proved or even offered any direct evidence—that Smith might have tampered with the ballots while they were in his possession.<sup>45</sup> They certainly showed beyond a shadow of a doubt that Smith was a Federalist sympathetic to Jay's candidacy and thus had a motive (as well as an opportunity) to commit some ballot tampering.<sup>46</sup> But the Clintonians did not allege that Smith's partisan conflict of interest was itself a violation of law or even a factor relating to whether Smith had contravened the relevant electoral statute.<sup>47</sup> Rather, the Clintonians claimed simply that Smith was no longer Otsego's legal sheriff, and because of that technical defect alone, all of the county's ballots must be rejected as null and void.<sup>48</sup>

Under New York's election statute, the decision whether to count the disputed ballots was in the hands of a joint canvassing committee: six senators and six representatives from the state's legislature, with each group appointed by its own chamber.<sup>49</sup> The statute required this joint canvassing committee to meet at the office of the secretary of state to open the sealed boxes delivered from the county sheriffs and then canvass the votes contained within them.<sup>50</sup> The only

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41. *Id.* at 178-80.

42. See *id.* at 177-80. This account explains that there were in fact two competing sets of returns from the town of Cherry Valley. One had been properly sealed—the one that Smith believed to be the valid one. But he included the other set of returns, not sealed in the container from that town, so that the canvassers could make a final decision on the matter. *Id.*

43. See DAVIS, *supra* note 38, at 335-38 (explaining that the canvassing committee described the Otsego ballots as “enclosed in a *sufficient* box” and did not dispute the right of a valid sheriff to appoint a deputy to deliver that box to the committee (emphasis added)).

44. *Id.*

45. See generally TAYLOR, *supra* note 27, at 179 (detailing the numerous opportunities Smith and other Federalists had to tamper with the ballot box).

46. *Id.* at 179-80.

47. *Id.* at 180.

48. *Id.*

49. Act of Feb. 13, 1787, 1787 N.Y. Laws 33.

50. *Id.*

explicit provision in the statute for not counting ballots was “if the number of ballots in any inclosure shall exceed the number of Electors contained on the poll lists in the same inclosure,” in which case the committee “shall proceed to draw out and destroy unopened so many of the said ballots as shall amount to the excess, and shall proceed to canvass and estimate the residue.”<sup>51</sup> But the statute also explicitly provided that “all questions which shall arise upon such canvass and estimate, or upon any of the proceedings therein, shall be determined according to the opinion of the major part of the [committee] . . . and their judgment and determination shall in all cases, be binding and conclusive.”<sup>52</sup> The statute further required the committee, after deciding which candidate had won, “immediately” to “destroy” the “poll-books” and all other voting materials relating to the counting and canvassing of ballots.<sup>53</sup> Based on this clear-cut language, both sides to the controversy believed that the joint canvassing committee’s decision would be final and irreversible in any other legal proceeding under the laws and constitution of New York.<sup>54</sup>

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51. *Id.*

52. *Id.* at 34.

53. *Id.*

54. In all of the historical research conducted for this project, there has emerged only one tantalizing reference that the Federalist attorneys considered going to court to overturn the canvassing committee’s certification of the election’s outcome. This reference comes in a single sentence of a letter of Josiah Ogden Hoffman, who at the time was a member of New York’s legislature and who later became the state’s attorney general. The letter to Peter Van Schaack, dated June 26, 1792, is held at the New York Historical Society, and a copy is on file with the author. It is also mentioned in a biography of Rufus King. See ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 177 (1968) (“One [Federalist] suggested confidentially that, if a new election were not feasible, the legislature might order a quo warranto, which would leave the legality of Clinton’s election in the hands of the judiciary.”). The relevant passage of the letter reads, “If the legislature cannot order a new election[, i]s not in their power to order a quo warranto & thus leave the decision to our judges[?]”

Quo warranto is an ancient writ used to try the legitimacy of an officeholder’s title to an office. The most important early use of quo warranto in the United States to challenge an incumbent governor’s reelection based on wrongdoing in the counting of ballots occurred in Wisconsin’s gubernatorial election of 1855. See Attorney Gen. *ex rel.* Bashford v. Barstow, 4 Wis. 567 (1855). This Wisconsin Supreme Court decision, which ordered the incumbent governor to vacate his office because he was not the rightful winner of the election, is considered the *Marbury v. Madison* of Wisconsin law. JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN’S LEGAL SYSTEM 79-80 (1999). In truth, however, it is a much more momentous decision than *Marbury* itself—which, after all, refused to issue an order to the federal executive in that case and instead claimed that the Court lacked the jurisdiction to do so. For a discussion of *Bashford v. Barstow*’s celebrated status in Wisconsin’s history, see chapter 9 of JOHN BRADLEY WINSLOW, THE STORY OF A GREAT COURT (1912).

In light of Wisconsin’s subsequent success with the use of quo warranto for its 1855 gubernatorial election, it is thus intriguing to speculate what might have happened if the Federalists had similarly attempted to invoke this ancient writ in New York’s disputed gubernatorial election

Thus, it mattered immensely who constituted this joint canvassing committee. The members had been chosen in early April in advance of the election. The Democratic-Republicans controlled both houses of the state legislature at the time; therefore, they had the power to appoint a majority of canvassers from their party.<sup>55</sup> They exercised this power in a rather unusual way. In the state senate, a bipartisan compromise had resulted in the appointment of three canvassers from each party.<sup>56</sup> In the assembly, the Federalists thought they had secured a similar deal, but they got outmaneuvered. As a result, all six of the assembly's canvassers were Democratic-Republicans, for an overall majority of nine to three.<sup>57</sup>

Being savvy politicians, the Federalists saw the composition of the canvassing committee as a bad sign. Robert Troup, a Federalist attorney, played a leading role in advocating Jay's position before the committee and in the court of public opinion.<sup>58</sup> Troup had been Alexander Hamilton's roommate at Columbia (then called King's College) and had studied law under Jay's tutelage.<sup>59</sup> One could consider Troup's role roughly comparable to the one that Ron Klain played for Al Gore during the legal fight over the 2000 presidential election.

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of 1792. The mere fact that Hoffman briefly contemplated the possibility is therefore significant. But it is important to understand that his suggestion of pursuing quo warranto, which comes in the form of a question, is entirely tentative. Indeed, the very next sentence of Hoffman's letter reveals, "This is quite a new idea in my mind [and I] have thrown it out for your consideration." The suggestion, moreover, seems to have been dropped almost as soon as it was made; no evidence has been uncovered to indicate that either Hoffman or anyone else pursued it further.

It is worth noting as well that even Hoffman's brief suggestion contemplated legislative action as a precursor to seeking a writ of quo warranto in court. Given the exclusive jurisdiction of the canvassing committee under existing New York law, Hoffman was not suggesting that the Federalists could pursue a judicial remedy against the canvassing committee without some additional legislative intervention. In other words, Hoffman never seemed to have in mind the idea of seeking a writ of quo warranto based purely on protecting the fundamental constitutional right to suffrage, even though Federalists at the time were attacking the canvassing committee in constitutional terms. *See infra* notes 113, 116-18 and accompanying text. Instead, Hoffman apparently only thought of quo warranto as a kind of ancillary fix to a potential separation-of-powers problem; it would be necessary for the legislature to overturn a canvassing committee's certification of an election, but if the legislature could not itself issue the overruling order (because doing so would be in the nature of a judicial decree and therefore improper for the legislature to perform itself), perhaps the legislature by statute could empower the judiciary to issue an appropriate quo warranto decree. In any event, historically enticing as it is, Hoffman's tentative suggestion came to naught.

55. Berkin, *supra* note 27.

56. TAYLOR, *supra* note 27, at 177.

57. *Id.*

58. Robert Troup to Jay (May 6, 1792), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 422-23 (Henry P. Johnston ed., 1891); *id.* at 424-27.

59. JOSEPH BLUNT, AMERICAN ANNUAL REGISTER OF PUBLIC EVENTS FOR THE YEAR 1831-32, at 389-90 (1833).

After hearing the news concerning the partisan make-up of the canvassing committee, Troup wrote Jay on June 10 saying, "My hopes, however, are not very strong, considering the situation of that infamous party."<sup>60</sup> In another letter, Troup's fears were expressed even more vividly: "I confess that I have serious apprehensions that no motives whatever will be sufficiently powerful to restrain them from so flagrant an attack on the rights of an election."<sup>61</sup> Thus, there was already a fear of a party-line vote.

Another Federalist attorney who helped to advocate Jay's position was James Kent.<sup>62</sup> At the time, Kent was a relatively junior member of the state assembly.<sup>63</sup> He later would become chancellor of New York, the state's highest judicial officer, as well as the first professor of law at Columbia University.<sup>64</sup> Often called the "American Blackstone" because of his *Commentaries on American Law* modeled after Blackstone's treatment of English law, Kent is an important figure for understanding the Founding Generation's views on how a constitutional democracy should handle a disputed chief executive election, either for governor or president.<sup>65</sup>

Thus, it is significant that Kent, like Troup, focused on the partisan imbalance of the canvassing committee as the critical defect in the state's legal machinery for dealing with the dispute over the Otsego ballots. In a letter to his brother, he wrote:

The Senate did as they ought to do; they chose three friends to Jay: Jones, Roosevelt, and Gansevoort; and three friends of Clinton: Gelton, Joshua Sands, and Tillotson. The Assembly chose six devoted Clintonians, to wit: Jonathan N. Havens, M. Smith, John D. Coe, Pierre Van Cortlandt, Junior, Daniel Graham, and David McCarty. This I deem to have been a corrupt thing in the Assembly.<sup>66</sup>

"Corrupt" is a strong word, but Kent meant it. He thought that the canvassing committee could not fairly and legitimately decide which of the two sides won the election unless the committee's membership was evenly balanced towards both sides: "These canvassers form a court of the highest importance, a court to decide on the validity of elections without appeal. They ought at least to have

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60. Robert Troup to Jay (June 10, 1792), *supra* note 58, at 430.

61. Letter from Robert Troup to John Jay (May 27, 1792) (on file with Columbia University Library), available at <http://wwwapp.cc.columbia.edu/ldpd/jay/item?mode=item&key=columbia.jay.11219>. Troup was confident in the merits of Jay's position and thus saw bias as the only obstacle to victory: "my mind, if I had confidence in the integrity of the canvassers, would be in a state of perfect tranquility." *Id.*

62. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 43 (Da Capo Press 1970) (1898).

63. *Id.* at 37-42.

64. See generally JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847 (1939) (a major scholarly biography of Kent).

65. *See id.*

66. KENT, *supra* note 62, at 44-45.

been equally biased.”<sup>67</sup> This passage in Kent’s letter is one of the most important from the whole episode. It shows that a major participant in the controversy, who would later become one of the nation’s foremost legal thinkers, recognized that the legitimacy of the dispute’s outcome required the impartiality of the tribunal charged with resolving it. In this context, impartiality required more than sound judicial temperament. It required the physical manifestation of evenhandedness by making sure that the tribunal was composed of equal numbers from each of the two competing political parties.

The phrase “equally biased” is perhaps infelicitous, but it is a personal letter, after all, and it unambiguously gets the point across. Kent recognized that one could not expect partisans to be able to put aside their partisan leanings in the context of a dispute over the outcome of a major statewide election like that for governor (or presidential electors). Therefore, to guard against the likelihood of partisans acting out of partisanship, one needed to put an equal number from each party on whatever “court” had jurisdiction to adjudicate this particular kind of dispute.

Although Kent clearly recognized this important point—and that fact alone is of major significance—we shall see that neither he nor anyone else acted on this recognition. This fact, too, is of extreme importance. Why could the Founders not create an impartial tribunal, which Kent so clearly saw as essential to the legitimacy of an election’s outcome? Even if they could not create this impartial tribunal in 1787, when they wrote the Constitution (and New York’s election statute), why could they not do so after they lived through the disputed gubernatorial election of 1792? That question is a vexing and pressing one.

## II. THE LEGAL BATTLE BEFORE THE CANVASSING COMMITTEE

The canvassing committee met from May 29 to June 12 of 1792.<sup>68</sup> In the run-up to its deliberations, both sides conducted organized and energetic public relations campaigns over whether the committee should count the Otsego ballots. Although they had no television or Internet, they had a multitude of newspapers and pamphleteers, and both sides made maximum use of the available media to press their legal arguments on why they should prevail.<sup>69</sup>

### *A. The Use of Lawyers to Win a Disputed Election*

A common belief today is that, prior to the 2000 presidential election,

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67. *Id.* at 45. A recent experiment has tested a version of the evenly balanced tribunal that Kent contemplated. See Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEG. & PUB. POL. (forthcoming 2010). One significant feature of this experiment was that its three-member tribunal maintained its evenhandedness while avoiding the risk of deadlock by having the two members from opposite parties choose a neutral tiebreaker to join them. Kent’s plea for an impartial tribunal, by contrast, did not specify any details on exactly how it should be structured.

68. TAYLOR, *supra* note 27, at 180.

69. See Berkin, *supra* note 27.

political candidates did not enlist large teams of lawyers in an effort to litigate their way to victory.<sup>70</sup> But this current notion is an anachronistic fallacy. A review of previously close presidential elections—including 1884 and 1916, as well as the monumental legal fight over the outcome in 1876—reveals that presidential candidates historically have been prepared to use attorneys to wage a legal battle over counting of ballots when their attorneys advise them that there are potentially winnable legal arguments to make.<sup>71</sup> Similarly, Clinton and Jay used attorneys in 1792 much the same way as did Bush and Gore in 2000. The 1792 legal fight was confined to the jurisdiction of the canvassing committee because New York law unambiguously gave that body exclusive legal jurisdiction over the dispute, whereas Bush and Gore could litigate in multiple forums. But Jay's lawyers would have pursued their legal arguments in other venues, had they been available, and they explored ways to get around the exclusivity of the committee's jurisdiction. The use of lawyers to obtain electoral victory in both 1792 and 2000 has more similarities than differences.

Aaron Burr and Rufus King, the two U.S. senators from the state, each took the most publicly visible role for his candidate's side.<sup>72</sup> They were the James Baker and Warren Christopher of their day. Burr orchestrated Clinton's legal position, as Baker did two centuries later for Bush.<sup>73</sup> King was the illustrious statesman who added gravitas to Jay's position, foreshadowing the role that Christopher was supposed to play for Gore.<sup>74</sup>

As in 2000, Burr and King were but the pinnacles of the two respective armies of attorneys. Burr recruited an array of dignitaries to write legal memoranda in Clinton's defense. Most prominent among these was Edmund Randolph, then Attorney General of the United States. Randolph's role, thus, was a little like Ted Olson's in *Bush v. Gore*.<sup>75</sup>

In addition to King, Troup, and Kent, Jay's team included figures forgotten

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70. See generally Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007) (discussing rise of election litigation since 2000).

71. Edward B. Foley, Close Presidential Elections: The 1880s & 1916, Disputed Elections Seminar (Feb. 19, 2010) (unpublished manuscript) (on file with author).

72. See generally Robert Troup to Jay (May 20, 1792), *supra* note 58, at 424-27; DAVIS, *supra* note 38, at 331-57 (detailing the roles of Burr and King).

73. See DAVIS, *supra* note 38, at 333.

From the moment that Colonel Burr was driven to interfere in the controversy, he took upon himself, almost exclusively, the management of the whole case on the side of the anti-federal party. . . . Full scope was allowed for the display of those great legal talents for which he was so pre-eminently distinguished.

*Id.* (quoting Burr).

74. See generally JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION (2001) (explaining that as events in Florida unfolded, Christopher ended up receding into the background, largely abandoning the effort to push Gore's position to Ron Klain and David Boies).

75. Olson presented the oral argument for Bush in the Supreme Court and would later serve as Bush's Solicitor General.

to most of us today, but who were prominent in their times—for example, William Lewis, who had been a federal judge in Philadelphia,<sup>76</sup> and John Trumbull of Connecticut, who would become a judge and had been a law partner of John Adams.<sup>77</sup> Alexander Hamilton also played a role in Jay's camp, although he was largely a behind-the-scenes political strategist.

A smattering of names alone does not convey the scale of the legal effort in the Republic's first major disputed election. As historian Frank Monaghan wrote in his biography of Jay, "every lawyer" in New York City, as well as some from Philadelphia, "rummaged in his books for relevant arguments."<sup>78</sup> At the time, Troup himself wrote to Jay that while the canvassers were deliberating, "the lawyers, who are friendly to your interests, met, and we determined to address the public on the subject of the Otsego votes and give a formal opinion upon it as lawyers."<sup>79</sup> The effort was well-orchestrated; Troup boasted, "We have taken a bold and decisive part . . . It threw the Clintonian lawyers also into a ferment; they went about the city to and from the place of canvassing like mad men."<sup>80</sup>

Thus, the energy that motivated each side to win the legal dispute easily matched that of the 2000 election. In one letter to Jay, Troup complained that "Brockholts and his virtuous colleagues are stuffing the news papers with dissertations on the subject."<sup>81</sup> But Troup added that their side was going to match the effort: "Mr. Harrison on our side has written a very ample & able refutation of all the arguments urged in these dissertations & the refutation will appear in tomorrow's paper."<sup>82</sup> It was, in other words, a paper-based version of the same legal tit-for-tat that occurred on CNN in 2000.

### *B. Advocacy Based Not on Precedents, But Principles*

A full understanding of this combined legal and public relations battle would require a review of all, or at least many, of the newspapers and pamphlets that weighed in on the issue. In the section that follows, we will consider only the arguments of Burr and King as the leaders of each team. But beforehand one general observation is appropriate. It is striking how the lawyers of the time were so evidently fashioning new American arguments to address a new American issue, which was arising for the first time in the context of the post-revolutionary, non-monarchical democratic republic that our founding fathers created for us. As

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76. *Biographical Directory of Federal Judges: Lewis, William*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1395&cid=999&ctype=na&instate=na> (last visited Nov. 12, 2010).

77. *Trumbull, John*, in 27 ENCYCLOPAEDIA BRITANICA 324 (11th ed. 1911).

78. FRANK MONAGHAN, JOHN JAY 334 (1935).

79. Robert Troup to Jay (June 10, 1792), *supra* note 58, at 429.

80. *Id.*; see also HORTON, *supra* note 64 (illustrating how Kent's papers also reveal the efforts that he, along with other Federalists lawyers, undertook to support Jay's legal position).

81. Letter from Robert Troup to John Jay (June 3, 1792) (on file at the Columbia University Butler Library, Rare Book & Manuscript Division).

82. *Id.*

lawyers, they had been trained to read and cite English precedents, and they did so. But none of those precedents was really on point for the problem at hand: ballots in an election for the chief executive of a free democratic republic. New York was a sovereign state that had declared its independence from Great Britain. To be sure, New York had very recently joined with the twelve other free and independent states of America to form “a more perfect union” at the Constitutional Convention. But electing the governor of New York was not entirely unlike trying to elect the King of England—an impossibility, of course, and thus unprecedented.

It is worth pausing to reflect on just how inexperienced Americans were in 1792 with the phenomenon of a statewide election for governor. Only Connecticut and Rhode Island had elected governors during colonial times, and these had been weak chief executives largely beholden to each colony’s legislature.<sup>83</sup> The other colonies had royally appointed governors. By 1792, only New York and Massachusetts had strong governors comparable to the chief executive role of the President in the federal government. New York had been electing its governor every three years since 1777, for a total of five elections before 1792, and each of those times Clinton had won decisively.<sup>84</sup> Massachusetts first elected its governor in 1780, did so annually until 1920, and thus had a dozen gubernatorial elections before 1792, but it did not have a significant *disputed* gubernatorial election until 1806. Thus, New York had no relevant precedent for the Clinton-Jay battle.

New Hampshire had begun electing its governor in 1784, Pennsylvania in 1790, and Delaware in 1792.<sup>85</sup> That was it—a total of seven states with very limited experience with gubernatorial elections by the time of the Clinton-Jay dispute. The rest of the original thirteen states, mostly in the South, had legislatively appointed governors and would not elect them until well into the nineteenth century.<sup>86</sup> Thus, in the brief period between the Declaration of Independence in 1776 and the New York election of 1792, there was virtually nothing that the new nation had yet encountered to prepare it for the legal fight between Clinton and Jay before the canvassing committee. In 1782, there had been a dispute in an election for a single seat in Pennsylvania’s Supreme Executive Council during the period before that state had a single-person chief

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83. JOSEPH E. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 15 (1966).

84. MICHAEL J. DUBIN, UNITED STATES GUBERNATORIAL ELECTIONS, 1776-1860: THE OFFICIAL RESULTS BY STATE AND COUNTY 160 (2003).

85. *Id.* at 26, 146, 215.

86. Here are the years in which each of these states first elected their governors:

Georgia	1825
North Carolina	1836
Maryland	1838
New Jersey	1844
Virginia	1851
South Carolina	1865

executive.<sup>87</sup> William Lewis, who was from Pennsylvania, drew the rest of the Jay team's attention to that precedent.<sup>88</sup> But that precedent was of limited utility because it involved an election for a representative from a district to a multi-member body; therefore, it resembled a legislative election much more than the statewide gubernatorial election in New York.

As for the collective experience of the new United States during the entire time that it consisted of British colonies, there was absolutely nothing for the lawyers to draw upon. A leading text on colonial elections flatly states, "The writer has found nothing which would tend to show how contests concerning the election of governor and other general officers were decided."<sup>89</sup> Thus, the lawyers for Clinton and Jay were without relevant precedents, and they recognized as much. Indeed, they knew that they would be creating the first major precedent for the new Republic on how to handle a disputed statewide election for chief executive. Moreover, they knew that this first important precedent would have relevance for presidential elections as well as gubernatorial ones. Reflecting on the significance of their situation in a letter to Hamilton, King worried that if the law proved inadequate to the task at hand, "what are we to expect from disputes that will arise in presidential elections?"<sup>90</sup>

Given the absence of relevant precedent, the attorneys for Clinton and Jay turned to fundamental principles to support each side's cause. They had invoked fundamental principles in the Declaration of Independence, the Constitution, the supporting *Federalist Papers*, and in all the constitutional promulgations in the states during the revolutionary era. But now, for the first time, they needed principles for how to handle a dispute over ballots that would be decisive in the democratic election of the governor of their state. What is particularly important to us is that they were unable to settle upon a single set of principles. Their dispute was not about how to apply an agreed-upon set of principles to a particular factual situation. Instead, the Clinton and Jay supporters divided over the first principles that should govern their dispute. Moreover, their disagreement over first principles is the beginning of a basic jurisprudential debate in the field of election law that continues to this day. Indeed, it is remarkable how much the basic arguments on both sides of the Clinton-Jay dispute are essentially the same as the basic arguments of the Bush-Gore battle, as well as the Coleman-Franken fight over the 2008 U.S. Senate election in Minnesota.

### C. The Arguments of Burr and King

The opinions of Aaron Burr and Rufus King have stature not merely because of their authors' prominence (both being New York's U.S. senators at the time),

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87. The 1782 Pennsylvania dispute will be analyzed in the book that Steven Huefner and I are writing; additional research is necessary to develop a full understanding of that episode.

88. See *infra* note 201.

89. CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 188 (Burt Franklin ed., 1893).

90. See *infra* notes 184-86 and accompanying text.

but because their opinions were officially sought by the canvassing committee. The canvassers did so because they were from the beginning divided amongst themselves on what to do about the dispute.<sup>91</sup> Thus, they specifically asked Senators Burr and King to address these questions:

1. Was Richard R. Smith the sheriff of the county of Otsego when he received and forwarded the ballots by his special deputy?
2. If he was not sheriff, can the votes sent by him be legally canvassed?
3. Can the joint committee canvass the votes [from the one town, Cherry Valley] when sent to them in two parcels, one contained in a box, and the other contained in a paper, or separate bundle? Or,
4. Ought they to canvass those sealed in the box, and reject the others?<sup>92</sup>

In response to this request, Burr wrote that Richard Smith was definitely not a de jure sheriff because his exercising authority for that office had expired.<sup>93</sup> More importantly, Burr denied that Smith could be considered a de facto sheriff since he had openly repudiated his claim to the office and, more importantly, had openly assumed a different position (that of town supervisor) that was incompatible with service as sheriff. Burr claimed that there was no “urgent public necessity” or imperative that Smith act immediately as sheriff to send the ballots to the secretary of state.<sup>94</sup> The task could have waited for his replacement’s commission to arrive, or efforts could have been made to move the transmission of that commission more hastily.<sup>95</sup>

In making this last point, Burr was alluding to political machinations in Otsego County that caused the delay in replacing Smith as sheriff. Smith was a Federalist allied with Jay and with William Cooper, the leading figure of Otsego County at the time, after whom Cooperstown is named. In a Pulitzer Prize-winning history of Cooper and his role in New York politics, historian Alan Taylor describes how Cooper connived with Smith and Jay’s running mate for lieutenant governor, Stephen Van Rensselaer, to keep the commission out of the hands of the new appointee, Benjamin Gilbert.<sup>96</sup>

The power to appoint Smith’s successor had been in the hands of a board controlled by Clinton as the incumbent governor.<sup>97</sup> Consequently, Gilbert, unlike Smith, was emphatically not a Federalist, as Clinton had rejected Federalist recommendations for Smith’s successor (including Smith’s own

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91. DAVIS, *supra* note 38, at 332.

92. *Id.* at 335.

93. *Id.* at 340.

94. *Id.*

95. *Id.* (“Mr. Gilbert [the replacement] was qualified in season to have discharged the duty, and, for aught is shown, his attendance, if really desired, might have been procured still earlier.”).

96. TAYLOR, *supra* note 27, at 179.

97. *Id.* at 167.

recommendation).<sup>98</sup> Van Rensselaer was the only Federalist on the appointment board and managed to get hold of Gilbert's commission, saying that he would be responsible for its delivery to Cooper in Otsego County, to pass it on to Gilbert himself. But Van Rensselaer purposively held onto it so that Cooper could keep Smith as acting sheriff until after the delivery of Otsego's ballots to the secretary of state, *for the specific purpose that the delivery of ballots would be in the hands of Smith, a Federalist.*<sup>99</sup> Indeed, Van Rensselaer wrote a letter to Cooper unabashedly expressing this plan:

I delayed sending Sheriff Gilbert's commission till after the Election lest by some irregularity your Poll, which in all probability will turn the Election should be rejected. . . . Pray detain the Commission until Smith has deputed some faithful person to deliver the box [of ballots] to the Secretary [of state].<sup>100</sup>

Although Van Rensselaer expressed fear that Gilbert, as an anti-Federalist, would use his power as sheriff to swing the election to Clinton, Van Rensselaer was essentially engaged in the same impropriety as Jay's running mate. By his own admission, he was the one using his official power to manipulate the vote-counting process to make sure that a loyal partisan controlled the ballots. Moreover, Smith kept the county's ballots for five days in a safe located in a store he co-owned with Cooper, the county boss and his Federalist ally. To make matters even worse, the person that Smith picked as his deputy to deliver the ballots, Leonard Goes, was a loyal affiliate of Van Rensselaer. Historian Alan Taylor, based on his thorough review of all the available evidence, concludes that in his judgment neither Cooper nor Smith actually stuffed the ballot box for Jay while it was in his hands.<sup>101</sup> (For whatever it might be worth, Smith submitted an affidavit swearing that he "did fairly, honestly, and impartially keep them in [his] possession.")<sup>102</sup> Instead, the conspiracy to delay Gilbert's commission seems motivated, as Van Rensselaer expressed, as a kind of insurance policy or preventative measure against letting the ballots fall into the other side's hands. In Taylor's words, "[i]t is very unlikely that Cooper, Smith, or Goes tampered with the ballots, given their confidence that Otsego had produced near unanimity for Jay. They had simply taken excessive precautions to safeguard the precious ballots that would, they anticipated, carry the election."<sup>103</sup> Maybe so, but it sure looked horrible. It would be as if during the 2000 presidential election, Jeb Bush or Katherine Harris had intentionally delayed the replacement of the custodian of

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98. *Id.* at 179.

99. *Id.*

100. TAYLOR, *supra* note 27, at 179.

101. *Id.*

102. Berkin, *supra* note 27, at 27. To refute the charge that Cooper had improper access to the ballots, Smith said that his office had been in Cooper's store for years with the implication that he really could not store them any other place and that there was nothing untoward about it. *Id.* at 28.

103. TAYLOR, *supra* note 27, at 179.

the ballots in Palm Beach County to make sure that the ballots remained in loyal Republican hands.

This background is important for evaluating Burr's argument to the canvassing committee that the formal defect in Smith's status as sheriff mattered and that there should be strict enforcement of the election code to assure the integrity of elections. "The direction of the law is positive," Burr wrote to support his conclusion that "the ballots delivered by the deputy of Mr. Smith cannot be legally canvassed."<sup>104</sup> Burr acknowledged that if the only defect were the ballots from Cherry Valley, they could be set aside, and the remainder could be counted. But the defect in Smith's status applied to all the ballots. In his view, it was not a mere formality. Rather, "considering the importance of the trust in regard of the care of the ballots and the extreme circumspection which is indicated in the law relative to elections,"<sup>105</sup> the "positive" law must be followed. As such, there was no delivery of the Otsego ballots by either a de jure or de facto sheriff, and thus the situation was one in which the "sound discretion" of the canvassing committee "would require that the whole should be rejected."<sup>106</sup> Although Burr hedged a bit by referring to the canvassing committee's authority to exercise "sound discretion" and "judgment," he had no fear that they would choose Jay over Clinton insofar as their hands were not completely tied one way or the other. Nonetheless, in stating his bottom-line conclusion, Burr suggested that the canvassing committee actually had no legal alternative to ruling in Clinton's favor on the ground that the entirety of the Otsego ballots "cannot be legally canvassed."<sup>107</sup>

In his opinion to the canvassing committee, Burr did not overtly refer to Van Rensselaer's role in causing a loyal Federalist without any lawful authority to be the one to deliver the Otsego ballots. Burr was the consummate crafty politician and presumably wanted to avoid making enemies unnecessarily. He undoubtedly believed that mentioning the relevant facts of what happened in Otsego County was unnecessary and that his literalist view of election law would resonate with those Clintonians on the canvassing committee who distrusted Van Rensselaer and his Federalist co-conspirators.

By contrast, in advocating Jay's position before the canvassing committee, King premised his argument on the assumption that there had been no allegation of impropriety with respect to the ballots themselves, nor any assertion of ballot tampering while they were in Smith's custody and during their delivery to the secretary of state.<sup>108</sup> Accordingly, King emphasized that the voters should not

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104. DAVIS, *supra* note 38, at 340.

105. *Id.* at 341.

106. *Id.*

107. *Id.* at 340.

108. A copy of King's statement to the canvassers is also contained in DAVIS, *supra* note 38, at 336. An original version of both statements can be found in AN IMPARTIAL STATEMENT OF THE CONTROVERSY RESPECTING THE DECISION OF THE LATE COMMITTEE OF CANVASSERS (1792). Despite its title, the "impartiality" of this pamphlet can reasonably be questioned, as it is understood that Burr orchestrated the particular selection of opinions in an effort to influence public opinion

suffer from the deficiencies in Smith's lawful status as sheriff. King thought that under a provision of the New York constitution that permitted sheriffs to hold office for up to four years, it could be argued that Smith was de jure sheriff until his successor actually replaced him, which had not yet occurred at the time the ballots were transmitted.<sup>109</sup>

But King placed more emphasis on his contention that Smith was entitled to be considered de facto sheriff because by deputizing Leonard Goes, he was publicly continuing to act as sheriff "under colour of a regular appointment."<sup>110</sup> He bolstered his de facto argument by underscoring the necessity of protecting the rights of the voters. As King put it, Smith's actions "ought to be deemed valid" because considering them so is "*necessary* to the carrying into effect the rights of suffrage of the citizens of that county."<sup>111</sup> Elsewhere in his opinion, King was even more emphatic in stating that the interest of the voters should be paramount in the interpretation and enforcement of the state's election laws. He insisted that "[t]he election law is intended to render effectual the constitutional right of suffrage; it should therefore be construed liberally, and the means should be in subordination to th[at] end."<sup>112</sup> Neither David Boies nor any of Gore's other lawyers could have said it better.

Jay's lawyers repeated this basic principle throughout their public campaign. Here is how one missive signed by seven New York lawyers put it: "The law on every occasion should be liberally expounded to protect and enforce the rights of suffrage as constituting the basis on which the freedom of our government depends."<sup>113</sup> Jay's team also repeatedly complained that the other side was resting on a mere technicality, insofar as Burr and Clinton's other allies expressed

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to his side of the case. *See* YOUNG, *supra* note 27, at 318.

109. DAVIS, *supra* note 38, at 336.

110. *Id.* at 337.

111. *Id.* (emphasis in original).

112. *Id.* at 338.

113. This statement appears in a letter signed by the seven lawyers and reprinted in AN IMPARTIAL STATEMENT, *supra* note 108, at 24. The same seven lawyers, however, published a much fuller account of their position. REASONS IN SUPPORT OF AN OPINION OFFERED TO THE PUBLIC RESPECTING THE VOTES OF OTSEGO COUNTY (1792). This pamphlet elaborated:

It [s]hould have been sufficient to have resorted to the right of suffrage as the fundamental principle of our constitution. It might undoubtedly have been argued with great force, that every act of the legislature which *directly* or *indirectly* infringes so essential a right, must be considered a nullity; that every act of the legislature which directs the mode of exercising this right, must be liberally expounded; that, for the preservation of it, wherever the positive law have become impracticable from *unforeseen accidents*, the people are not to suffer, their votes are to be received, and the first offices of the state to be conferred by the will of the majority, the only legitimate source of power.

For these principles we entertain the highest respect. They are derived from an authority superior to any in our books of reports—the authority of the constitution. *Id.* at 4 (emphases in original).

only the argument that Smith's defective status as sheriff was enough to toss out the ballots (and did not raise the underlying facts surrounding Van Rensselaer's impropriety). "A law quibble" is what the Federalists called the Clintonian position.<sup>114</sup>

#### *D. The Great Debate Between Strict and Lenient Enforcement*

From an analysis of the opinions that Burr and King delivered to the canvassing committee, it is easy to see that each side quickly staked out opposing positions on what would become the basic jurisprudential debate in vote-counting disputes throughout the history of election law in the United States. The Clinton team took the view that the New York statute must be enforced strictly in order to protect the integrity of the electoral process. The Jay team countered that the election statute should be enforced leniently to safeguard the right to vote.

One can see this great jurisprudential debate arising in 1792 even more clearly if one examines not just the opinions of Burr and King, but also other especially lucid expressions of the argument from each side. On Clinton's side, there was the opinion of Edmund Randolph, the first Attorney General of the United States. He made Burr's integrity point much more forcefully:

The very sacredness of the right of suffrage exacts a degree of rigor, in insisting on those rules which are designed to be the outworks of its defence. In proportion to its magnitude, is it in the hazard of being abused, since the temptation is more violent. With this belief the legislature called upon the sheriff *officially* to be the fiduciary of the ballots. Through this pure channel, delineated by law, ought they, therefore, to come—Otherwise, subtilty [sic] and refinement may, by degrees, reduce this security against fraud to a mere nullity.<sup>115</sup>

Randolph, like Jay's supporters, invoked the right to vote. Indeed, he called it sacred. But he claimed that its protection requires the *rigorous* enforcement of the rules for counting and canvassing these votes, including the reporting of local results to the relevant statewide office. Randolph explicitly raised the specter of potential "fraud" in this vote-counting process. Like Burr, however, he did not need to allege specifically that fraud had occurred in Otsego County. Instead, Randolph made the prophylactic point that strict enforcement of these vote-counting rules as a general practice reduces the risk of an election tainted by fraud.

Now contrast Randolph's forceful defense of electoral integrity with a legal opinion supporting Jay's position written by John Trumbull, John Adams's former law partner, who at the time was serving in Connecticut's legislature:

The existence of all representative republics is founded on the rights of

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114. See *infra* note 227. Kent also used the phrase "law quibbles" to refer to the Clintonian position. See Letter from James Kent to Moss Kent, Jr. (June 15, 1792) (PDF of original manuscript on file with author).

115. AN IMPARTIAL STATEMENT, *supra* note 108, at 37 (emphasis in original).

suffrage. This right is fully established in the Constitution of the State of New-York. The Legislature have undoubtedly authority to pass laws to guard this right, but not to destroy it; to regulate, but not to prevent the exercise of it; to point out the proper mode in which returns shall be made; but not to devise modes that may be impracticable.

Had the Legislature directly enacted that the votes of Otsego [and the other two] Counties should not be canvassed, every person would consider this act unconstitutional and void.

What the Legislature cannot do by direct statute, they certainly cannot do by construction and implication.

If it therefore becomes impossible in any case, that the statute relative to the return of ballots should literally be complied with, I should consider the law in that instance void; and am of the opinion that in such case all votes fairly given and honestly returned, ought to be canvassed; for the rights of the free electors ought always to be preferred to the mere forms of law.<sup>116</sup>

Trumbull went on to argue, “Had the Sheriff of any County died before the day of the Election, and no new Sheriff be appointed before the day of return, in which case the County would clearly be without a Sheriff, I should consider a return by the [poll] Inspectors as valid.”<sup>117</sup>

John Trumbull said that the Otsego ballots should be considered in the same category; therefore, the expiration of Smith’s commission should not interfere with their being counted.<sup>118</sup> What is particularly striking about Trumbull’s argument is that he considered the fundamental right to vote not merely an abstract philosophical idea, but a constitutional requirement that is enforceable as constitutional law which supersedes and voids contrary statutory law (in the way that *Marbury v. Madison* would articulate a decade later).<sup>119</sup> Furthermore, Trumbull considered the constitutional status of the right to vote as requiring flexible enforcement of statutory rules regarding the voting process when flexibility is necessary to secure the underlying fundamental constitutional right. Thus, from the same basic right to vote in a constitutional republic, Trumbull

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116. Trumbull’s statement is contained in a Federalist pamphlet prepared to counter the one orchestrated by Burr. This Federalist counter-pamphlet was somewhat ironically entitled AN APPENDIX TO THE IMPARTIAL STATEMENT OF THE CONTROVERSY RESPECTING THE DECISION OF THE LATE COMMITTEE OF CANVASSERS (1792). This passage from Trumbull is on page 12 of the pamphlet.

117. *Id.* The separate pamphlet of the seven New York lawyers made a similar point: “If the sheriff should die, or refuse to receive the ballots, the people . . . ought not to be without a remedy.” REASONS IN SUPPORT, *supra* note 113, at 5.

118. *Id.* at 13.

119. See *Marbury v. Madison*, 5 U.S. 137 (1803). This same point can be made about the statement of the seven New York lawyers, who were emphatic in saying that “the right of suffrage” comes from the constitution and thus supersedes any contrary statutory law. See REASONS IN SUPPORT, *supra* note 113, at 4.

reasoned to exactly the opposite conclusion from Randolph regarding strict versus lenient enforcement of the statutory rule on delivery of ballots from county to secretary of state.

The debate between Randolph and Trumbull did not concern facts on the ground in Otsego County or even the details about the nature of the particular election statute. Instead, their debate was much more fundamental. It was simply whether, as a matter of general principle, it is better to protect the right of free citizens to participate in electoral democracy by strict or lenient enforcement of statutes that regulate the counting and canvassing of ballots.

This elemental debate between Randolph and Trumbull is the same as the one that occurred between Bush and Gore in 2000 and between the candidates in Minnesota's 2008 U.S. Senate election—as well as any number of other examples throughout U.S. history.<sup>120</sup> Bush's team, of course, was the one to argue for strict enforcement in 2000. For example, the Bush team argued that “hanging chads” should not count when the rules required voters to remove the chads completely. Conversely, Gore's team called for the counting of these hanging chads in order to protect the voters from disenfranchisement. In the lawsuit over Minnesota's 2008 U.S. Senate election, it was Franken who argued for strict enforcement of the statutes concerning the submission of absentee ballots, whereas Coleman urged lenient enforcement and disregarding of “mere technicalities” so as to avoid the disenfranchisement of well-intentioned and otherwise eligible absentee voters.<sup>121</sup>

Thus, the terrain on which this basic jurisprudential battle is fought changes from one election to another. In 2000, it was chads on punch-card ballots. In 2008, it was information that voters were required to fill out on the outer envelopes when submitting absentee ballots.<sup>122</sup> And in 1792, it was the rules for transmitting ballots from each county to the secretary of state. In each instance, the circumstances are somewhat different with potential policy implications. In the case of the hanging chads, the voters were arguably in a position to protect themselves, as Justice O'Connor observed at the oral argument in *Bush v. Gore*.<sup>123</sup>

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120. In 2010, this same basic debate is playing out again in Alaska in the dispute over misspelled write-in ballots for Lisa Murkowski. Her opponent, Joe Miller, advocates strict enforcement of the state statute that requires voters to complete write-in names as they appear in the declaration of candidacy. Murkowski, conversely, seeks a more lenient implementation of the statutory rule in order to avoid disenfranchising voters who undoubtedly intended to cast their ballot for her. See Kim Murphy, *Alaska Senate Race Could Hinge on a Legal Wrangle*, L.A. TIMES (Nov. 11, 2010), <http://www.latimes.com/news/nationworld/nation/la-na-alaska-senate-20101112,0,1891443.story>.

121. Edward B. Foley, How Fair Can Be Faster—and Other Lessons of *Coleman v. Franken* (2010) (unpublished manuscript) (on file with author).

122. In the latest incarnation of this basic dispute, unfolding as this article is being completed, the particular subject matter is the spelling of a write-in candidate's name. See Becky Bohrer, *Murkowski Camp Cries Foul in Alaska Ballot Count*, ASSOCIATED PRESS (Nov. 11, 2010), <http://www.chron.com/disp/story.mpl/ap/nation/7290902.html>.

123. Transcript of Oral Argument at 57, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

In the 2008 dispute over Minnesota's absentee ballots, the situation was mixed and complicated. In some instances, the voters themselves could have filled out the envelopes properly, but other voters received the wrong envelopes from their local election officials and thus could not help but submit their absentee ballots incorrectly.<sup>124</sup> In 1792, none of the voters in Otsego County were in a position to protect themselves from the fact that Smith was no longer the legal sheriff.

But the relative "culpability" of the voters is only one factor to consider in the debate between strict and lenient enforcement of vote-counting statutes. For example, ballot boxes with broken or missing seals might be entirely the fault of election officials and not innocent voters. And yet one might take the position (as some courts historically have) that the ballots in these tampered boxes cannot be counted, even though discarding them obviously disenfranchises the innocent voters in that particular election. It is a question of balancing the risk to the integrity of the election with the right to vote. In some contexts, the balance might weigh in favor of strict enforcement of the relevant election statute—as the Clintonians were essentially arguing in 1792.

Despite the difference in particular contexts between 1792 and 2000 (or 2008), it is remarkable how little the jurisprudential debate has changed over two centuries.<sup>125</sup> One can understand that when this debate emerged in 1792, it might have been conducted without nuance or special sensitivity to the particular conditions relevant to weighing the balance between integrity-protection and disenfranchisement-avoidance. After all, in 1792 the jurisprudence of American election law was in its earliest stage of development. But by the time the same debate occurred in the twenty-first century, considerable sophistication and refinement should have been expected, such that the discussion of whether to count hanging chads would be considered distinguishable from the problem of flaws in ballot-box delivery. Yet there was surprisingly little advancement in the argument between strict and lenient enforcement from 1792 to 2000 (or 2008). What the lawyers for Bush and Gore said about protecting the integrity of the electoral process or avoiding the disenfranchisement of voters was the same as what Randolph and Trumbull said in 1792.<sup>126</sup> The twenty-first century debate between strict and lenient enforcement remains largely generic rather than context-specific and seems to be stuck in essentially the same basic place that it was when the debate began in 1792. The fact that our nation's legal system has not been able to advance the debate beyond where it began, over two hundred years ago, is itself significant.<sup>127</sup>

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124. See Foley, *supra* note 121. In the Alaska write-in situation, by contrast, the voters could have protected themselves by spelling "Murkowski" correctly (a task arguably easier than even dislodging chads from punch-card ballots when the machines were already clogged with chads from previous ballots).

125. For an effort to move the debate forward, see Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

126. For a summary of the arguments in 2000, see TOOBIN, *supra* note 74.

127. In recognition of this problem, the American Law Institute has recently authorized a project to examine whether improvement might be made in this regard. The author of this article

### E. The Canvassing Committee's Decision

The canvassing committee voted 7-4 in favor of excluding the Otsego ballots and thus certified Clinton as the winner.<sup>128</sup> (One member of the committee inexplicably was absent.) This vote, as Troup had feared, was essentially along party lines. The Federalist position picked up one more vote than the “three friends to Jay” that Kent had identified.<sup>129</sup> Interestingly, the fourth pro-Jay vote came from state senator Joshua Sands, who would later run for Congress as a Federalist.<sup>130</sup> Therefore, if Sands actually was more Federalist than Clintonian when he cast his canvassing committee vote, the 7-4 split could be viewed as 100% partisan in its division. Even so, the five “devoted Clintonians” from the assembly, together with their two faithful partisans from the Senate, controlled the canvassing committee’s outcome.

The committee’s majority and dissenters issued written opinions in support of their respective positions.<sup>131</sup> Not surprisingly, these opinions echoed the arguments made to the committee by each side’s lawyers. Like judges embracing arguments of opposing briefs, the committee’s majority adopted the “integrity” position advocated by Burr and Randolph, whereas the dissenters relied on the same “right to vote” argument as King and Trumbull.

The majority explained its position as to why the statute regarding delivery of the ballots to the secretary of state by a county sheriff must be strictly enforced by refusing to count ballots transmitted in violation of this statutory requirement. Otherwise, “a provision intended as security against impositions would be an engine to promote them.”<sup>132</sup> They could not accept the contrary proposition, which they believed would obligate them to “canvass and estimate votes, however fraudulently obtained” by any person claiming to be sheriff “though, it [s]hould be evident to them, at the [s]ame time, that he was *not the sheriff*.”<sup>133</sup>

In raising the possibility of fraud, the majority opinion—in sharp contrast to the submissions by Burr and Randolph on behalf of Clinton—explicitly invoked the ugly facts in Otsego County surrounding the delay of Gilbert’s commission to replace Smith as sheriff. Stating that they had learned the relevant facts from the secretary of state, the majority emphasized that Smith had stored the ballot

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has agreed to serve as the reporter for this new ALI project.

128. TAYLOR, *supra* note 27, at 180.

129. See KENT, *supra* note 62. The 7-4 vote can be seen from the original opinions issued by the canvassers. See also YOUNG, *supra* note 27, at 309-10 (describing the 7-4 vote and citing the original documents).

130. THE PAPERS OF ALEXANDER HAMILTON, VOLUME XXV: JULY 1800-APRIL 1802, at 611 n.1 (Harold C. Syrett ed., 1977).

131. See AN IMPARTIAL STATEMENT, *supra* note 108, at 11-12 (official order certifying the election for Clinton), 12-14 (dissenting opinions of Jones et al.), 14-15 (dissent of Joshua Sands), 15-20 (majority opinion).

132. *Id.* at 17.

133. *Id.* (emphasis in original).

box in Cooper's house at the same time Cooper was holding onto Gilbert's commission. "It is also to be fairly inferred," the majority reasoned, "that had proper measures been taken to give notice to Mr. Gilbert, he would forthwith have qualified [and] undertaken the execution of the office."<sup>134</sup> Given the risk of "*mischiefs*" (ballot tampering by Smith and Copper), the majority asserted, "[i]t did not seem possible . . . by any principle of law, by any latitude of construction, to canvass and estimate the ballots contained in the box thus circumstanced."<sup>135</sup> Thus, in explaining its view as to why protecting the integrity of the electoral process required strict enforcement of the statute, the majority opinion made the point concretely, whereas Burr and Randolph had not.

The majority again invoked the factual circumstances of the Otsego ballots in summing up its conclusion not to count them:

These facts with other suggestions of unfair practices, rendered the conduct of the Otsego election justly liable to suspicion; and the committee were constrained to conclude, that the usurpation of authority, by Richard R. Smith, was wanton and unnecessary, and proceeded from no motive connected with the preservation of the rights of the people, or the freedom *and purity of elections*.<sup>136</sup>

The majority finished by declaring that "freedom of elections, and the security against frauds" were "general principles" that applied to this situation, "compell[ing] them to reject the votes."<sup>137</sup> Thus, members of the committee majority were entirely aware that they were relying on what they saw as fundamental principles in reaching this first important decision, thus establishing the first major American precedent concerning the resolution of a disputed statewide election.

The dissenters on the canvassing committee also relied on their perception of first principles. There were two dissenting opinions—one by the "three friends to Jay" identified by Kent and the other by Joshua Sands.<sup>138</sup> Both dissents made the same substantive point, ultimately invoking, as King and Trumbull did, the fundamental right to vote as the reason for lenient enforcement of statutory rules regulating the counting of ballots. The main dissent argued, "in all doubtful cases, the committee ought, in our opinion, to decide in favour of votes given by citizens, lest by too nice and critical an exposition of the law, the rights of suffrage be rendered nugatory."<sup>139</sup> Similarly, Sands found that "in all doubtful cases, I conceive the committee ought to decide in favour of the votes given by the citizens."<sup>140</sup>

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134. *Id.* at 19.

135. *Id.* (emphasis in original).

136. *Id.* (emphasis in original).

137. *Id.* at 20.

138. Perhaps the fact that Sands wrote separately indicates that he had not yet entirely aligned himself with the Federalist party.

139. RANDOLPH, *supra* note 108, at 13.

140. *Id.* at 15.

The two dissents also argued that Smith could be considered at least a de facto, if not de jure, sheriff for the purpose of the statutory rule that the sheriff transmit the ballots to the secretary of state. Otherwise, as the main dissent put it, the county would have been without any person to act in that office, and that was a proposition “too mischievous to be established by a doubtful construction of law.”<sup>141</sup> Neither dissent, however, addressed any of the distasteful facts surrounding the delay of Gilbert’s commission or the storing of the ballots at Cooper’s house, upon which the majority opinion so emphatically relied in suggesting the possibility of fraud. Rather, the dissents were content to repeat that at most it was a “doubtful case,” implying that neither the majority nor anyone else had come forth with any direct evidence of ballot tampering by the Federalists in Otsego County.<sup>142</sup> Classifying it as a “doubtful case,” the dissents then fell back upon the basic principle that the enforcement of election laws should err on the side of counting, rather than discarding, the ballots of eligible voters.<sup>143</sup>

In hindsight, it seems fair to say that there were powerful arguments on both sides of the divided canvassing committee. Jabez Hammond, an early and influential historian in New York, reflected on the committee’s decision sixty years after it occurred. Hammond himself was a Democrat who served both as a state judge and member of Congress.<sup>144</sup> Still, known to be scrupulously nonpartisan in his historical judgments, Hammond saw the dissenters on the canvassing committee as having the better of the argument:

To my mind, the reasons assigned by Mr. King and by the minority of the committee in their protest, are strong and convincing. . . . The right of suffrage is a sacred and invaluable right which belongs to the elector, and of which he cannot be divested. . . . And he ought not and cannot be deprived of the effect of it, either by the non-feasance or misfeasance of the agent to whom the law commits the custody and care of his ballot.<sup>145</sup>

Hammond’s history, however, does not directly address the concern that fraud might have tainted the Otsego ballots. Subsequent historians have been more ambivalent in their assessment. Although Alan Taylor, in his prizewinning account of Cooperstown, reached the conclusion that the Federalists probably did not manipulate the counting of votes from Otsego, he acknowledged that their unsavory actions raised a legitimate concern that they might have.<sup>146</sup> Likewise,

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141. *Id.* at 13.

142. *Id.* at 13-15.

143. *Id.*

144. He also happened to live in Otsego County, though well after 1792. Born in Massachusetts, and only fourteen at the time of the disputed Clinton-Jay election, Hammond practiced law in Vermont before he eventually settled in New York. See *Hammond, Jabez Delno* [sic], BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000127> (last visited Nov. 12, 2010).

145. HAMMOND, *supra* note 27, at 68.

146. TAYLOR, *supra* note 27, at 179.

Alfred Young has observed that the Republicans had a valid point insofar as they believed that “elections laws had to be strictly observed lest precedents dangerous to free elections be established.”<sup>147</sup>

Even if there were meritorious arguments on both sides of the case, one can never know the extent to which the members of the canvassing committee were motivated by the merits of the position they took or by the simple fact that taking that position favored the candidate whom they wanted to win for partisan reasons.<sup>148</sup> It is the same problem that plagued the 5-4 Supreme Court decision in *Bush v. Gore*. One could claim that all the Justices, like all the canvassing committee members, were motivated by a sincere effort to reach the right decision as a matter of law, without regard to partisan consideration. But the coincidence between the Justices’ respective views of the law and their respective partisan leanings inevitably made the 5-4 split suspicious in 2000, just as the 7-4 split in 1792 was suspect for equivalent reasons.

There would have been a way to avoid this problem in 1792, as James Kent understood. If the canvassing committee had been constructed to be equally balanced between the two sides of the controversy, then its decision would have been nonpartisan whichever way it ultimately fell. A genuinely neutral and impartial decisionmaker could embrace the merits of either the “integrity” or “right to vote” position without the decision being inevitably tainted with the suspicion that it was the product of bias rather than merit. But New York in 1792 did not have this kind of evenhanded and impartial tribunal for its disputed gubernatorial election, and neither would the United States in 2000 for its presidential election.

### III. THE POLITICAL MAELSTROM THAT FOLLOWED

After the canvassing committee announced its decision, there was great public agitation, including threats of violence. This talk of the “bayonet,” which is how Alexander Hamilton described the commotion,<sup>149</sup> was in keeping with the character of this generation of revolutionaries who were not afraid of extralegal means to secure their fundamental right to a representative democracy.<sup>150</sup>

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147. YOUNG, *supra* note 27, at 305.

148. One historian of New York politics, writing in 1906, was particularly harsh in attributing partisanship as the motivating force behind the canvassing committee’s decision: “This was the first vicious partisan precedent established in the Empire State. It has had many successors . . . but none bolder and more harmful, or ruder and more outrageously wrong.” DEALVA STANWOOD ALEXANDER, 1 A POLITICAL HISTORY OF THE STATE OF NEW YORK 56 (Ira J. Friedman, Inc. 1969) (1909). This historian saw nothing of consequence in Cooper’s conduct in Otsego: “No ballots were missing, no seals were broken, nor had their delivery been delayed for a moment.” *Id.* at 57. Alexander, however, is hardly the only historian to take Jay’s side of the controversy. See, e.g., SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 52 (2005) (characterizing Clinton’s victory over Jay as resulting “only because of flagrant voter fraud”).

149. See *infra* note 172 and accompanying text.

150. The Declaration of Independence, of course, most famously asserts the “right of the

Moreover, it was not just the revolt against England that was revolutionary. The Constitution itself was an unauthorized break from the legal regime of the Articles of Confederation. As such, the great question for Jay and his supporters was whether to take to the streets and demand a new constitutional convention for the state of New York that would undo what they viewed as the partisan atrocity committed by the canvassing committee.<sup>151</sup>

#### *A. Public Agitation Against the Canvassing Committee's Decision*

As upset as Jay's supporters were about the canvassing committee's decision itself, they were perhaps even more enraged by the fact that the committee burned the Otsego ballots as soon as it decided not to count them. To be sure, as we have seen, the committee was entirely within its rights under the relevant statute to do so. Still, the Federalists were outraged that they could never prove exactly how many votes Jay would have won had he not been robbed of what they viewed as his rightful votes from Otsego County.<sup>152</sup> One Jay supporter wrote on the day of the canvassing committee's decision, "We have *as it were* two chief magistrates—one, the governor, by the voice of God, and the people, and another the governor of Mr. Burr and the canvassers."<sup>153</sup> This author added that "[the canvassers] ought to be impeached."<sup>154</sup> Also on the day of the canvassing committee's decision, Jay's wife wrote to him, "There is such a ferment in the

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People to alter or abolish" government, through the use of force if necessary, if government has wrongfully "become destructive" of the "unalienable Rights to Life, Liberty, and the pursuit of Happiness."

151. It is noteworthy that Jay and his supporters did not attempt to go to court to undo the determination of the canvassing committee. To be sure, that avenue seemed unequivocally closed by the statute, which explicitly said that the canvassing committee's "judgment and determination shall in all cases be binding and conclusive." 1787 N.Y. Laws 34. But today, were there a similar statute that purported to block judicial review of the vote-counting process, lawyers nonetheless would seriously consider possible arguments that might offer an end-run around even the most clear-cut statutory preclusion. As we know from the current habeas cases involving the Guantanamo detainees, if a question of constitutional rights is truly fundamental, there is almost always a way for a court to find some basis for jurisdiction to safeguard those fundamental rights. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (invalidating Congress's suspension of habeas corpus). To be sure, this is not to suggest that the integrity of the result of a gubernatorial (or even presidential) election is as important as preventing torture and indefinite detention in solitary confinement. Judgments reasonably may vary as to the hierarchy of "fundamentality" among various fundamental constitutional rights. Nevertheless, today's election lawyers certainly would explore the possibility of pursuing so-called "extraordinary writs" as a means of judicial relief before concluding that it would be a waste of time and effort to do so. From what one can discern from the historical record regarding the election of 1792, apart from a tentative suggestion in a single letter, *supra* note 54, Jay and his supporters never considered pursuing a judicial option.

152. *See, e.g.*, N.Y. DAILY ADVER., *infra* note 244 (Kent's speech).

153. Berkin, *supra* note 27, at 24 (emphasis in original).

154. *Id.*

City that it is difficult to say what will be the consequences.”<sup>155</sup> Hammond, in his early history of New York politics, reflected that “the state seemed menaced with the ascendancy of anarchy and utter confusion.”<sup>156</sup>

There were also marches, including those by local militia supporting Clinton. Cooper “hinted at armed rebellion,”<sup>157</sup> declaring that “a Face of Flint ought to be set against the insult.”<sup>158</sup> Ebenezer Foote, another Federalist, argued even more strongly that “Clinton must quit the Chair, or blood must and will be shed—and if no innocent blood was to flow, I would not care how soon it began to run.”<sup>159</sup>

Some blood did flow. There were fist fights and club battles between Jay and Clinton supporters at local taverns. At one skirmish, pistol shots were exchanged between two partisans. Fortunately, both shots missed. One of the canvassers challenged Van Rensselaer to a duel after the candidate spoke some hot words. Both showed up at the appointed hour, but Van Rensselaer offered a last minute apology, which was accepted.<sup>160</sup>

Much of the popular foment was directed towards political action that might undo the decision. Petitions were signed to convince the legislature to overturn the canvassing committee,<sup>161</sup> even though the statute gave the legislature no more right to do that than a court. One Federalist writer wrote, “I sincerely hope violent measures will not become necessary,” but he warned that “the independence of this country has been purchased at too dear a price” to let the decision stand.<sup>162</sup> There was also a Federalist plan to ask the legislature to call a convention for the purpose of overturning the canvassing committee, in recognition that the legislature lacked the authority itself.

Frank Monaghan, the historian writing in the early twentieth century, quotes a proclamation written at the house of a shoemaker in Herkimer County. Monaghan characterizes this proclamation as “the most remarkable document of this campaign of protest” because of its explicit invocation of the Declaration of Independence as authority for repudiating the canvassing committee’s decision.<sup>163</sup> The body’s decision was unlawful, the proclamation reasoned, because it repudiated the fundamental will of the majority of the people, who in their self-preservation were entitled to take “every laudable exertion within the verge of our strength and ability” to remove Clinton from office.<sup>164</sup> Thus, average citizens had no difficulty relying on the “first principles” underlying the founding of the Republic itself as sufficient justification for measures to remedy what they saw as the canvassing committee’s usurpation of the right to self-government that they

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155. TAYLOR, *supra* note 27, at 180.

156. HAMMOND, *supra* note 27, at 70.

157. TAYLOR, *supra* note 27, at 181.

158. *Id.*

159. YOUNG, *supra* note 27, at 311.

160. TAYLOR, *supra* note 27, at 181-82.

161. YOUNG, *supra* note 27, at 310.

162. Berkin, *supra* note 27, at 24.

163. MONAGHAN, *supra* note 78, at 340.

164. *Id.* at 336.

had fought so recently (and so hard) to secure.<sup>165</sup> And while this particular proclamation may have been exemplary, it by no means stood alone. Other voices also resorted to revolutionary first principles to defend unrest against the theft of their democracy.

### *B. The Conduct of the Losing Candidate*

Clinton was inaugurated for his new term on July 1.<sup>166</sup> The period between the canvassing committee's decision in the middle of June and the end of July set the stage for the decision that Jay as candidate, and the Federalists as his party, made on how they were going to respond to what they perceived as the theft of Jay's victory. Jay, as Chief Justice of the United States, was riding circuit in New England at the time. He heard news of the canvassing decision on June 18 in Hartford, Connecticut.<sup>167</sup> Appearing to take the news calmly, he wrote to his wife,

The reflection that the majority of the electors were for me, is a pleasing one; that injustice has taken place does not surprise me . . . . Having nothing to reproach myself with in relation to this event, it shall neither discompose my temper nor postpone my sleep. A few years will put us all in the dust, and it will then be of more importance to me to have governed myself, than to have governed the State.<sup>168</sup>

This letter signals an important theme: better to be magnanimous in defeat, because there will be another election in a few years when political fortunes may turn. As we shall see, Alexander Hamilton became a leading proponent of this view among Jay's advisers.

Meanwhile, back in New York, Jay's wife wrote her husband on June 12: "King says he thinks Clinton as lawfully Governor of Connecticut as of New York but he knows of no redress."<sup>169</sup> This assertion shows the inability of Jay's team to develop a judicial recourse.

On June 15, in *The Daily Advertiser*, "Gracchus" "proposed [that] meetings of electors in all the counties and committees of correspondence should be arranged."<sup>170</sup> Gracchus asserted that if "the ordinary powers of legislation, should prove an incompetent remedy for rescuing the people from a usurped authority; the same powers which established the constitution, must in the last resort

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165. *Id.*

166. HAMMOND, *supra* note 27, at 71.

167. MONAGHAN, *supra* note 78, at 336.

168. Letter from John Jay to Sarah Livingston Jay, in WILLIAM JAY, 1 THE LIFE OF JOHN JAY 289 (1833).

169. Letter from Sarah Livingston Jay to John Jay (June 12, 1792), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 58, at 433.

170. THE PAPERS OF ALEXANDER HAMILTON, VOLUME XI: FEBRUARY-JUNE 1792, at 591 n.3 (Harold C. Syrett ed., 1966).

convene for its preservation.”<sup>171</sup>

On June 28, Hamilton, while Secretary of the Treasury, wrote to King,

I have not, as you well may imagine, been inattentive to your political squabble. I believe you are right (though I have not accurately examined) but I am not without apprehension that a ferment may be raised which may not be allayed when you wish it. Tis not to be forgotten that the opposers of Clinton are the real friends to order [and] good Government, and it will ill become them to give an example of the contrary.

Some folks are talking of Conventions and the Bayonet. But the case will justify neither a resort to first principles nor to violence. Some amendments of your election law and possibly the impeachment of some of the Canvassers who have given proofs of *premediated* partiality will be very well—and it will answer good purposes to keep alive within proper bounds the public indignation. But beware of extremes!

There appear to be no *definite declared* objects of the movements on foot which renders them the more Ticklish. What *can* you do? What do you *expect* to effect?<sup>172</sup>

Here Hamilton was acting in his role as a somewhat detached adviser. True to character, he was being prudent and cautious. He viewed the Federalists as the party of conservatism, and despite its shared revolutionary heritage with the Democratic-Republicans, he wanted to distance the Federalists from revolutionary means, especially in this instance. He was not averse to a little rabble-rousing for partisan gain, but he did not want it to get too far out of hand. Although he did not say why, he did not believe the facts regarding the theft of Jay's victory warranted the kind of extreme measures that some Federalists were advocating.

As Jay was traveling back to New York City, he stopped in the town of Lansingburgh, New York (a little north of Albany). He was received by a committee of citizens whose public address in support of him expressed their “sincere regret and resentment at the palpable prostitution of those principles of virtue, patriotism, and duty, which has been displayed by a majority of the canvassing committee, in the wanton violation of our most sacred and inestimable privileges, in arbitrarily disfranchising whole towns and counties of their suffrages.”<sup>173</sup> They added that “though abuse of power may for a time deprive you and the citizens of their right, we trust the sacred flame of liberty is not far extinguished in the bosoms of Americans as tamely to submit to wear the

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171. *Id.*

172. Letter from Alexander Hamilton to Rufus King (June 28, 1792), in HAMILTON, *supra* note 170, at 588-89 (emphases in original). On this letter, King notes, “I have had not agency in promoting the measures adopted respecting the decision of the [c]anvassers. I have however felt the utmost indignation.” *Id.* at 591 n.3.

173. Lansingburgh Committee to Jay, in 3 JAY, *supra* note 58, at 436.

shackles of slavery, without at least a struggle to shake them off.”<sup>174</sup> Thus, by their words, these citizens appeared to be urging Jay to take more aggressive measures to defend his claim of victory.

Jay, however, responded cautiously:

[E]very event is to be regretted that tends to introduce discord and complaint. Circumstanced as I am in relation to the one you mention, I find myself restrained by considerations of delicacy from particular remarks.

The people of the State know the value of their rights, and there is reason to hope that the efforts of every virtuous citizen to assert and secure them will be no less distinguished by temper and moderation, than by constancy and zeal.<sup>175</sup>

On July 2, Jay passed through Albany, where another committee of citizens made a similar address:

[A] majority of the Committee of Canvassers, by an unwarrantable stretch of power, rejected the votes of several whole Counties, in direct violation of law, justice, precedent, and the most essential principles of our constitution—their object, as it most glaringly appears, being to secure an administration favourable to their views, in opposition to the voice of a majority of the people.<sup>176</sup>

This committee was prepared to exercise restraint, but only up to a point:

[W]e shall wait with a firm and cool deliberation for Legislative interposition to afford or procure redress. . . . [C]ould it possibly happen, that we meet with disappointment, the people must proceed to determine, whether a Chief Magistrate is to be elected by their voice, or by a Committee, the majority of whom were selected and named by a party; and those who may be the cause, must be answerable for the consequences that may follow.<sup>177</sup>

Jay's reply to this group hinted a little more at a desire to find some recourse:

[P]rudence dictates a great degree of delicacy and reserve; but there are no considerations which ought to restrain me from expressing my ardent wishes that the important question you mention may be brought to a decision which all that mature reflection as well as manly constancy which its connection with the rights of freemen demands; with all that temper which self-respect requires; and with all that regard to conciliation, benevolence, and good neighbourhood which patriotism

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174. *Id.*

175. *Id.* at 437.

176. *Id.* at 438.

177. *Id.* at 439.

prescribes.<sup>178</sup>

This speech indicates that he was hedging just enough in case sufficient support developed for more drastic measures to install him in office. Still, he wished to remain noncommittal.

Jay arrived home in New York City on July 10, where he was greeted by much larger crowds with sentiments similar to those he received upstate in Lansingburgh and Albany.<sup>179</sup> His local welcoming committee declared,

This wanton and daring attack upon the invaluable rights of suffrage has excited a serious alarm amongst the electors of the State, and united them in measures to obtain redress. In the pursuit of an object so interesting we shall like freemen act with moderation and order; but at the same time with zeal and perseverance. Whilst we respect the laws, we respect ourselves and our rights and feel the strongest obligations to assert and maintain them.<sup>180</sup>

Arguably, receiving this same message in Manhattan was even more significant, given the city's greater population and role as a center of commerce. But Jay already appeared to be backing away from the precipice when he replied to his supporters three days later:

Such is our Constitution, and such are the means of preserving order and good government, with which we are blessed, that, while our citizens remain virtuous, free, and enlightened, few political evils can occur, for which remedies perfectly effectual, and yet perfectly consistent with a general tranquility cannot be found and applied.

I derive great satisfaction from the hope and expectation that the event which at present excites so much alarm and anxiety, will give occasion only to such measures as patriotism may direct and justify; and that the vigilance and wisdom of the people will always afford to their rights that protection for which other countries, less informed, have often too precipitately recurred to violence and commotion.

In questions touching our constitutional privileges, all the citizens are equally interested; and the social duties call upon us to unite in discussing those questions with candour and temper, in deciding them with circumspection and impartiality, and in maintaining the equal rights of all with constancy and fortitude.

They who do what they have a right to do, give no cause of offence; and therefore every consideration of propriety forbids that differences in opinion respecting candidates should suspend or interrupt that mutual good-humour and benevolence which harmonizes society, and softens

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178. *Id.* at 440.

179. See, e.g., STAHR, *supra* note 28, at 288 (describing "hundreds" of supporters who greeted Jay on his arrival on Harlem Heights in upper Manhattan).

180. Letter from Nicholas Cruger and the New York Committee to Jay (July 13, 1792), in 3 JAY, *supra* note 58, at 442.

the asperities incident to human life and human affairs.

By those free and independence electors who have given me their suffrages, I esteem myself honoured; for the virtuous, who withheld that mark of preference, I retain, and ought to retain, my former respect and good-will.<sup>181</sup>

These remarks sound like a concession speech. Jay spoke clearly against violence and for reconciliation. Yet this speech did not close the door entirely to the pursuit of additional measures. In the back of Jay's mind, he still may have been hoping that the idea of a new constitutional convention, which his Federalist friends were exploring, might work.

### C. *The Consideration of a New Constitutional Convention*

Ironically, John Jay himself was the principal author of New York State's first constitution in 1777, shortly after the Declaration of Independence.<sup>182</sup> He was proud of his handiwork, but it clearly failed him as a candidate for governor in 1792. The state constitution's failings were not limited to the fact that its authors did not anticipate the development of a two-party rivalry that would infect the gubernatorial election and, more importantly, institutions of government like the canvassing committee. Even worse, the New York Constitution of 1777 contained no mechanism for any constitutional amendments.<sup>183</sup>

Because Clinton's supporters controlled the state legislature at the time, the Federalists were in no position to get the legislature to adopt any statutory measures to undo the canvassing committee's ruling. Nor would the legislature be inclined to call for a new constitutional convention to replace or amend the 1777 constitution for the particular purpose of nullifying Clinton's re-inauguration based on the committee's divided decision. Thus, if the Federalists were to have any hope of calling a new constitutional convention for this purpose, they needed to figure out how to do so through entirely extralegal means, outside the parameters of the 1777 constitution itself. This idea was the one the Federalists focused on while Jay was traveling back to New York City from riding circuit in New England.

On July 10, the same day that Jay heard from his many agitated New York City supporters, King wrote to Hamilton to convey the news of Jay's travels and the receptions Jay was receiving. In this letter, King characterized Jay as advocating for the idea of a single-purpose constitutional convention (at the same time that Jay was being guarded in his public comments):

The addresses from [A]lbany and other northern Towns, together with Mr. Jay[']s answers leave no room to doubt that the question will be

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181. Letter from John Jay to the New York Committee (July 16, 1792), in 3 JAY, *supra* note 58, at 443-44.

182. CHARLES Z. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK: 1609-1822, at 162-88 (1906).

183. *Id.*

brought to a decision in some way or other—if it can be done under any authority of Law I shall rejoice, because I consider the Determination to be a precedent dangerous to free Elections. Still however I do not clearly see the prudence of an appeal to the People—yet others have no doubts on that subject, and there is reason to conclude that Mr. Jay deems the occasion such as will justify the step should it be found that the powers of government are insufficient to afford a Remedy. He has an idea of a convention for the sole purpose of canvassing the canvassers and their Decision.

But Mr. Clinton is in fact Governor, and though he may not be free from anxieties & Doubts, he will not willingly relinquish the Office—the majority, and a very great one are now against him—should he persist, and the sword be drawn, he must go to the wall—but this my dear Sir, is a dreadful alternative, and what & whom it may affect is altogether uncertain. If this case will justify a recurrence to first Principles, what are we not to expect from the disputes, which must & will arise in the Succession of the Presidency? And how are we able to place confidence in the security of our Government?<sup>184</sup>

This letter is rich with details and significance. Here we see King's understanding of the canvassing committee's "[d]etermination" as a "precedent dangerous to free elections" and where, in particular, he saw this precedent as potentially affecting presidential as well as gubernatorial elections.<sup>185</sup> Even so, for what today we would describe as pragmatic reasons, King was not inclined to support Jay's direct "appeal to the [p]eople" through the mechanism of a single-purpose constitutional convention. King thought Jay's belief that a resort to "first [p]rinciples" was morally justified in this situation precisely because "the powers of government [were] insufficient to afford a [r]emedy."<sup>186</sup> But strategically King feared that even if the Federalists were successful in calling this single-purpose constitutional convention, Clinton would refuse to quit the governorship; therefore, "the sword [would] be drawn" and the conflict would end in "dreadful" violence.<sup>187</sup> Thus, out of "prudence," King indicated that he disfavored the pursuit of any extralegal means and wanted to challenge the canvassing committee only "if it [could] be done under any authority of [l]aw."<sup>188</sup> Alas, King was never able to develop any legal avenue of redress.

Kent became another proponent of the single-purpose constitutional convention. Initially, his view was closer to King's, thinking that the Federalists should simply acquiesce for fear of sparking political violence:

The people, in their original character, can, no doubt, rectify the

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184. Letter from Rufus King to Alexander Hamilton (July 10, 1792), in THE PAPERS OF ALEXANDER HAMILTON, VOLUME XII: JULY-OCTOBER 1792, at 20-21 (Harold C. Syrett ed., 1967).

185. *Id.*

186. *Id.*

187. *Id.* at 20.

188. *Id.*

grievance, but I don't see that the ordinary legislatures have jurisdiction over a contested election to the chief magistracy. The peace of the community requires an ultimate decision somewhere, and if we attempt to declare the chair vacant, we must assume the powers of the convention parliament in 1688, and if the Governor would claim his office under the certificate and law, I see no peaceable way to accommodate. My idea is that we ought, from consideration of peace and prudence, to acquiesce in the authority of the decision. It is highly proper, however, that the people should reprobate the atrocious insult and injury, and pursue with recrimination and punishment the authors of the wrong, as far as the law will tolerate them.<sup>189</sup>

This letter shows that from the start Kent had some form of a convention in mind. But he had not yet formulated a way to make the plan palatable to his sense of the need for civic peace. By July 11, the day after King wrote to Hamilton about the idea of a single-purpose convention, Kent was doing the same in another letter to his brother:

I have, since my last letter, revolved in my mind a mode of redress now in contemplation, and I warmly advocate it. It is that a convention be called under the recommendation of our legislature, to take the decision into review and to ratify or annul it and order a new election, as they shall deem proper. This mode is wise, benign, orderly, and republican, and no application can be made to it of the harsh and forbidding name of faction and sedition. I shall espouse it, and I believe firmly that it will succeed. I hope therefore what I wrote before will be no check to your ardent hopes of redress.<sup>190</sup>

Kent's support for this idea indicates how seriously it was considered. He was in the legislature at the time and by nature cautious (as his initial inclination showed). If he was on board, the idea was gaining momentum.

By contrast, Hamilton, who was entirely opposed to Jay's concept of a single-purpose convention, responded to King on July 25 that King needed to talk Jay out of this idea:

I received lately a letter from you, in which you expressed sentiments according with my own, on the present complexion of your party politics, as, if a letter of mine to you did not miscarry, you will have seen. I wished that Clinton and his party should be placed in a just light before the people, and that a spirit of dissatisfaction, within proper bounds, should be kept alive; and this for national purposes, as well as from a detestation of their principles and conduct.

But a resort to first principles, in any shape, is decidedly against my judgment. I don't think the occasion will, in any sense, warrant it. It is

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189. Letter from James Kent to Moss Kent, Jr. (June 15, 1792), in *MEMOIRS AND LETTERS OF JAMES KENT*, *supra* note 62, at 45-46.

190. *Id.* at 46-47.

not for the friends of good government to employ extraordinary expedients, which ought only to be resorted to in cases of great magnitude and urgent necessity. I reject as well the idea of a Convention as of force.

To rejudge the decision of the Canvassers by a Convention, has to me too much the appearance of reversing the sentence of a Court by a Legislative decree. The canvassers had a final authority in all the forms of the Constitution and the laws. A question arose in the execution of their office, not absolutely free from difficulty, which they have decided (I am persuaded wrongly) but within the power vested in them. I do not feel it right or expedient to attempt to reverse the decision, by any means not known to the *Constitution or laws*. The precedent may suit us today; to-morrow we may rue its abuse.<sup>191</sup>

Hamilton's character as the ever-careful calculator is evident in this letter. Again, he was willing to stoke the flames of public passion a little, as long as it was not too much, and he quickly linked the New York fight between the Federalists and Democratic-Republicans with the national version of the same conflict.<sup>192</sup> But echoing his letter to King a month earlier, which Hamilton feared was lost in the mail, Hamilton elaborated on his belief that "a resort to first principles"<sup>193</sup>—either by force, or even by convention—was unwarranted.

Hamilton's arguments against Jay's idea of a single-purpose convention are nuanced and sophisticated. Seeing the canvassing committee as equivalent to a court, as Kent did, Hamilton believed it wrong that a legislative body (including a constitutional convention) would upset an already adjudicated judicial decision.<sup>194</sup> Legislative revision of judicial judgments, in Hamilton's view, risked replacing the rule of law with the arbitrary tyranny of legislative whims.<sup>195</sup>

Hamilton also recognized the existence of two alternative views on whether the canvassing committee's decision was as wrong as Jay's supporters claimed. Perhaps because Hamilton watched the controversy from afar (he alluded to this fact later in this letter), or perhaps because of his calculating temperament, he saw the canvassing committee's decision as plausible. Hamilton hastened to add that

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191. Letter from Alexander Hamilton to Rufus King (July 25, 1792), in 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 1755-1794, at 417 (Charles R. King ed., Da Capo Press 1971) (1894).

192. One national concern of the Federalists was whether they would be able to keep control of the Vice Presidency, which Adams had occupied in Washington's first administration. Clinton's status in New York could affect his prospects as a potential Vice President from the Democratic-Republican party, allied with Madison and Jefferson on economic policies rather than with Hamilton and the Federalists.

193. Letter from Alexander Hamilton to Rufus King (July 25, 1792), *supra* note 191, at 417.

194. *Id.*

195. In this respect, Hamilton's separation-of-powers concern is a precursor of the Supreme Court's decision in *United States v. Klein*, 80 U.S. 128 (1871). See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (applying the *Klein* doctrine).

he viewed that decision as incorrect, of course (perhaps he doth protest too much), but nonetheless he did not think it could be placed outside the bounds of reason. He probably had heard the facts from Otsego County that would support the canvassing committee's ruling. And because the ruling was within the canvassing committee's exclusive jurisdiction, Hamilton (like King) saw no basis under New York's constitution or laws for overturning the ruling.

Hamilton's letter added an additional argument for opposing Jay's idea for a single-purpose convention. His additional argument is one often heard when the suggestion of a single-purpose constitutional convention is raised—which is that there is no guarantee of confining the constitutional convention to a particular issue. The Framers of the U.S. Constitution knew that truth from their own experience in 1787. Similarly, Hamilton argued that if the Federalists in New York got their wish for a constitutional convention to revise the canvassing committee's decision, the convention might go on to address other issues in ways not to the conservative Federalists' liking:

I am not even sure that [a convention] will suit us at all. I see already publications aiming at a revision of the constitution with a view to alterations which would spoil it. It would not be astonishing, if a Convention should be called, if it should produce more than it is intended. Such weapons are not to be played with. Even the friends of good government in their present mood may fancy alterations desireable [sic] which would be the reverse.

Men[']s minds are too much unsettled every where at the present juncture. Let us endeavor to settle them & not to set them more afloat.

I find that strong minded men here [in Philadelphia] view the matter in the same light with me; and that even Mr Jay[']s character is likely in a degree to suffer by the idea that he fans the flame a little more than is quite prudent. I wish this idea to be conveyed to him with proper management. I have thoughts of writing to him.

You see, out of the reach of the contagion, I am very cool and reasonable; if I were with you I should probably not escape the infection.<sup>196</sup>

Hamilton raised the thought that Jay's political future might suffer if he tried too hard to contest the canvassing committee's decision. In this respect, he moved away from his lawyerly opposition to the convention idea to opposition grounded in political considerations. Hamilton wanted Jay to be a viable candidate in future elections; this concern is one expressed throughout the history of disputed elections in the United States. Perhaps most famously, Richard Nixon refused to challenge John F. Kennedy's victory in 1960 for fear of being labeled a sore loser, and he won the 1968 presidential election.<sup>197</sup> More recently, some urged

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196. Letter from Alexander Hamilton to Rufus King (July 25, 1792), in XII HAMILTON, *supra* note 184, at 99 (emphasis in original).

197. For a review of recent scholarship on the 1960 presidential election, see David Stebenne, *The Election of 1960 Fifty Years Later*, ELECTION LAW @ MORITZ COMMENTARY (Nov. 8, 2010),

Gore in 2000 to back down rather than challenging the certification of Bush's victory in court, but Gore, perhaps to his detriment in 2004 and 2008, did not heed this advice.<sup>198</sup> Of course, going to court in 2000 is not the same sort of extralegal challenge as calling a constitutional convention in 1792.

Still, the larger point remains. Hamilton's concern was not about achieving a just outcome for the election of 1792. Rather, his concern was for positioning the Federalists and their candidates to prevail over the long term. Jay, the jurist, or perhaps just because he was the candidate affected, was having a harder time giving up on the justice of his cause. As a politician, he also recognized the importance of protecting his political reputation, but he was torn by these conflicting sentiments. Thus, as of the end of July, it was still an open question whether Jay would accept Hamilton's advice or, instead, go forward with the convention plan.

Accordingly, Hamilton would not let the matter drop. On July 27, he wrote King again, asking for "all the authorities which were consulted by you when you gave your opinion" on "the question decided by the [c]anvassers" because he (Hamilton) was "[d]esirous of examining [it] accurately."<sup>199</sup> He also wanted those documents "as soon as may be (had)."<sup>200</sup> Meanwhile, William Lewis wrote to Hamilton on July 21 of his opinion concerning the legality of the canvassing committee's decision:

My opinion . . . was founded on this Principle, that the important right of Suffrage being Secured to the People by the Laws and Constitution, and not depending on the Conduct of others, they cannot be deprived of it but by their own fault. That the manner of taking, & more especially [sic] of transmitting the votes, *being merely directory*, an Error or wilful [sic] neglect or disobedience in the officer in either of these particulars, will Subject him to punishment for a misdemeanor in office, but will not affect the Election or destroy the rights of the people, where no fraud or unfairness appears in the Conducting of the Election, and it is made Satisfactorily appear that the votes are the same that were given in with[ou]t Alteration Diminution or addition. That this principle applies with great force, where (as in the present Case) the Sheriff was not an Election Officer, nor a Person having anything to do with holding the Election, and where the Election itself is the Substance and the transmitting of the votes is only form. If this were not the Case any Sheriff might at pleasure deprive a whole County of the right of Suffrage! I know of no Case expressly in point, but there are many in the

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<http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7929>.

198. See, e.g., R.W. Apple, *The 2000 Elections: News Analysis; Recipe for a Stalemate*, N.Y. TIMES (Nov. 9, 2000), <http://www.nytimes.com/2000/11/09/us/the-2000-elections-news-analysis-recipe-for-a-stalemate.html> (comparing Gore's situation to Nixon's).

199. Letter from Hamilton to King (July 27, 1792), in 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING, *supra* note 191, at 417.

200. *Id.*

books the Principles of which I think are fully applicable.<sup>201</sup>

In this letter, Lewis did not refer to the idea of calling a constitutional convention or otherwise suggest how he would attack the canvassing committee's decision. But he seemed unwilling to let the matter rest, or at least he still seemed to be smarting from the injury inflicted by the committee.

During this same period of uncertainty, Cooper proposed to Van Rensselaer a new election in Otsego.<sup>202</sup> Meanwhile, King wrote back to Hamilton on July 29,

Mr. Jay will be with you this week—you will therefore have an opportunity to converse with him respecting our very unpleasant situation. All the measures which have been pursued have been calculated to induce the Legislature to call a convention to revise the decision of the canvassers. So far as I am able to form an Opinion, a majority of the Assembly are Clintonians, and if so, will not agree to call a convention—should this be the case, the business will then terminate.<sup>203</sup>

King seemed to be telling Hamilton that the convention idea was moving forward, but in a manner that would be unable to prevail. This scenario of the convention idea dying in the legislature was not entirely unwelcome to the Federalists. They could score political points by complaining of the injustice wrought by the canvassing committee, yet they would bear no responsibility for extralegal measures that might spin out of control, while at the same time blaming the legislature for doing nothing to redress the injustice.

Even into August, however, there were those still urging Jay and his allies to keep up the fight against the canvassing committee's decision. For example, on August 14, a federal district judge in Rhode Island, Henry Marchant, wrote to Jay,

While New England laments the loss the publick [sic] may sustain in your quitting your present important federal station, they feel as friends to order, decency, and the rights of man, a wish, not merely for your success, but the success of constitutional rights; and would not be happy to find the steady advocates of liberty desert the cause. Example is Precedent; and in our first setting out we should be cautious how we establish bad precedents. Posterity has a demand on us—that the laws and constitution we have been blessed with are not handed down to them mangled or in fetters.<sup>204</sup>

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201. Letter from William Lewis to Alexander Hamilton (July 21, 1792), in XII HAMILTON, *supra* note 184, at 65-66. This letter is the one in which Lewis refers to a Pennsylvania Supreme Court opinion from 1782 concerning an election to the supreme executive council of the state's legislature. The other precedents he mentions in the letter are British.

202. YOUNG, *supra* note 27, at 312.

203. Letter from Rufus King to Alexander Hamilton (July 29, 1792), in XII HAMILTON, *supra* note 184, at 65-66.

204. Letter from Henry Marchant to John Jay (Aug. 14, 1792), in 3 JAY, *supra* note 134, at

This letter is more evidence that members of the Founding Generation nationwide, and not just in New York, knew that they were setting a precedent (good or bad) by how they handled the dispute over the New York gubernatorial election of 1792. This episode was a “first setting out” regarding this kind of controversy, and Judge Marchant wanted Jay to press on and not “desert the cause” of “liberty.” As such, the precedent set would be one protective of “constitutional rights,” rather than leaving them “mangled or in fetters.”<sup>205</sup>

Nonetheless, according to this author, an even worse precedent would be one that settled disputed elections through violence rather than law. Therefore, Judge Marchant applauded Jay’s constraint in pursuing his cause. Recognizing that a temperate response to the canvassing committee might end in defeat, Judge Marchant saw defeat as preferable to victory by violence:

The delicate, prudent, and cautious manner, so peculiar to you, in which you answered the addresses of your fellow-citizens, has given great pleasure; for while it is our duty to contend against the violations of essential rights, it behooves us that we do not by our own conduct establish the violence we contend against. We had better fail—having done all that faithful citizens and guardians of the laws ought to do, than proceed by methods disgraceful to a good cause.<sup>206</sup>

Moderation, or perhaps ambivalence, is the mood that this letter ultimately conveys.

Robert Troup wrote to Hamilton, his former roommate, on August 24. Troup was not so moderate or ambivalent, as he had always been the one most vociferous in pressing Jay’s cause. (In this respect, too, his role resembles the one Ron Klain played for Gore two centuries later). Troup, presumably knowing that Hamilton counseled caution, defended his more aggressive stance:

I have as you have learnt taken a very active part ab[ou]t the wicked & abominable decision of the canvassers. I think & have always thought, my good friend, this decision to be subversive of the most sacred right that can be enjoyed under any government. Quickly therefore to submit to it would argue a poverty of spirit & an indifference to the principles of freedom which would fix an indelible stigma upon our characters. I have always imagined & now see no reason for imag[in]ing otherwise that we should not obtain redress. My object has been to make a strong impression upon the public mind of the deep corruption of Clinton & his party and thus to render him odious. We have pretty well succeeded in this object & I trust our success will be more complete. I have no apprehension that we shall endanger the political ship. It is the interest of us all that she should be kept in her present course with a fair wind . . . Be not therefore uneasy—but at the same [time] do not forget that

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444-45.

205. *Id.* at 445.

206. *Id.*

allowances should be made for the keen anguish we suffer from the wound we have received.<sup>207</sup>

In this way, Troup directly responded to Hamilton's concern that pressing forward might cause the situation to spin out of control. On the contrary, according to Troup, there was no danger to the polity if the Federalists convinced the public that justice required redress for Jay.

Hamilton, however, was not persuaded by Troup's plea. He wrote his own note on the back of Troup's letter: "No answer necessary."<sup>208</sup> Perhaps Hamilton already knew that Jay's cautious instincts would cause him to side with Hamilton, rather than Troup, on the course of conduct they should take.

#### *D. The View from Virginia*

Initially, moderates tended to support Jay's position, and even some Clintonians expressed reservation. From a distance, Jefferson thought that Clinton should repudiate his purported victory: "[it] does not seem possible to defend Clinton as a just or disinterested man if he does not decline the office."<sup>209</sup> He thought this even as he knew of the controversy over Cooper's conduct in Otsego.<sup>210</sup>

Historian Jabez Hammond says that Clinton could have acted magnanimously—"if he had advised them to allow the disputed votes, is it probable that a majority of the committee being his personal and political friends, would have rejected them?"<sup>211</sup> Hammond, however, observed what all of us have observed concerning candidates in more recent disputed elections:

The excitement produced by a heated and sharply contested election, in the result of which he was personally concerned, must have biassed [sic] and clouded the otherwise clear and pure mind of the governor. . . . How hard is it for the most pure minded man to adjudicate upon a question against his own wishes and interest? Besides this, the governor would have had to contend, and did have to contend, not only against his own interest and wishes, but against the persuasions and wishes of all those political friends who had steadily and zealously supported him, and whose political prospects greatly depended on the decision of the

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207. Letter from Robert Troup to Alexander Hamilton (Aug. 24, 1792), in XII HAMILTON, *supra* note 184, at 292.

208. XII HAMILTON, *supra* note 184, at 273 n.5.

209. STAHR, *supra* note 28, at 287.

210. "The Clintonians," Jefferson informed Madison, "tell strange tales about these votes of Otsego." Letter from Thomas Jefferson to James Madison (June 21, 1792), in 6 THE WRITINGS OF THOMAS JEFFERSON, 1792-1794, at 89 (Paul Leicester Ford ed., 1895). Jefferson was fearful that—as a result of the apparently stolen gubernatorial election in New York—if their party backed Clinton as the candidate for Vice President to replace Adams, "the cause of republicanism will suffer." *Id.* at 90.

211. HAMMOND, *supra* note 27, at 69.

canvassers. Considering therefore, the strength of party excitement, and the weakness of human nature, it is not surprising that Mr. Clinton should have desired that the canvassing committee should decide the election in his favor.<sup>212</sup>

In other words, Hammond says that no one should expect a politician to act based on honor and virtue when the prize at stake is a major one, like being governor of New York. Like Hammond, we could not have expected George Bush to say that Al Gore really deserved to be declared the winner of Florida's Electoral College votes, and thus the presidency, based on the defect of the "butterfly ballot" alone.<sup>213</sup>

Most interestingly, Madison expressed a nuanced view on whether Clinton should have "declined the office," as Jefferson claimed. First of all, Madison saw "the spirit of party" on both sides of the controversy based on his reading of the newspapers from New York.<sup>214</sup> For his part, Madison tried to articulate a detached perspective that was not infected by his own partisanship. "Whether Clinton ought to wave the advantage of forms," Madison wrote in response to Jefferson, "may depend I think on the question of substance involved in the conduct of the Otsego election."<sup>215</sup> Madison continued, "If it be clear that a majority of *legal* honest votes was given ag'st him [against Clinton], he ought certainly not to force himself on the people."<sup>216</sup> This sentence expressed agreement with Jefferson up to a point. If Jay's supporters were correct that the status of Smith as a sheriff was just a technicality, and the votes from the county were themselves sound, then Madison was siding with Jefferson in thinking that Clinton ought to do the honorable thing and decline to win based solely on a formal defect in the sheriff's status.

Madison, however, saw the situation as more complicated than Jefferson did. Immediately after the sentence just discussed, Madison continued, "on a contrary supposition"—meaning that if one supposed that there was a reasonable doubt whether Jay in fact won "a majority of *legal* honest votes"—then Clinton "[could not] be under such an obligation" to decline the office.<sup>217</sup> Madison explained that Clinton would actually owe it to his party to fight for the office if there was a plausible claim that he actually won more valid votes. Clinton in this situation, according to Madison, "would be restrained by respect for his party if not by a

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212. *Id.* at 69-70.

213. Patrick Buchanan acknowledged that most of the votes he got as a result of the butterfly ballot were, in all probability, intended for Gore—more than enough to put Gore ahead of Bush. Bush could have conceded the election on that basis, and perhaps that would have been the magnanimous thing to do. He did not, and as our political culture has evolved, we would not have expected him to do so.

214. Letter of James Madison to Thomas Jefferson (June 29, 1792), in 15 THE PAPERS OF JAMES MADISON 331 (rev. ed. 1983) (1971).

215. *Id.* at 331-32.

216. *Id.* at 332 (emphasis in original).

217. *Id.*

love of power.”<sup>218</sup> In other words, Madison was making an argument somewhat different from Hammond’s. It is not merely that we can expect politicians to act based on political ambition even when honor or virtue would dictate otherwise. Rather, there are situations in which a partisan politician has a duty to his own party to pursue the party’s interest—even if the party’s interest is not identical to a neutral view of the public interest—as long as there is some doubt about whether or not the party’s interest coincides with the neutral view.

Madison’s position here is quite a change from his *Federalist Papers* antagonism to the spirit of partisanship in general. Madison still wanted the public interest to prevail, and he still believed that a partisan politician must put aside partisan advantage when what the public interest calls for is “clear.”<sup>219</sup> But here he appeared to be hoping for a political system that could combine two somewhat contradictory features: first, the system would permit politicians to act out of partisan motive when matters are not so clear-cut; yet, second, at the same time the system would figure out which partisan position coincides with an impartial view of the public interest. What Madison failed to provide in this letter to Jefferson was an explanation of the institutional apparatus that will protect the public interest when candidates like Clinton are acting out of partisan motives in circumstances where there appear to be plausible arguments on both sides. Madison did not tell us what to do when, for instance, Jay had good reason to think that he did win a majority of valid votes, whereas Clinton credibly could claim to the contrary. Madison did not discuss the institution of the canvassing committee or consider what to do if it were disproportionately populated by partisans, rather than being a balanced tribunal that would consider the claims on both sides fairly. Madison’s failure to spend more time on this specific New York election is understandable, but the consequences of his doing so remain with us today. His letter to Jefferson on the New York election reveals that his own perspective regarding partisanship articulated in the *Federalist Papers* was no longer operative in his own mind by 1792. Thus, his 1787 conception of constitutional institutions was founded on faulty premises. Yet he never updated his views about what constitutional institutions would be necessary in light of his new conception of the role of partisanship in democratic elections. In short, Madison, as our primary Founding constitutional architect, never designed the kind of tribunal we need to handle a disputed election where the candidates are entitled to press their competing partisan claims regarding which side won more valid votes.

Monroe, Madison’s compatriot in Virginia, offered yet another perspective on the events in New York from that southern state. He confessed to Madison that he could not figure out which side was right: “‘Tis difficult to estimate the merits of this controversy especially through the medium by which it is handed to the publick [sic] view.”<sup>220</sup> Were the Otsego facts as the Clintonians alleged,

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218. *Id.*

219. *Id.*

220. Letter from James Monroe to James Madison (June 27, 1792), in THE WRITINGS OF JAMES MONROE, 1778-1794, at 235 (Stanislaus Murray Hamilton ed., 1898).

laced with the suspicion of ballot-box tampering? Or were the Federalists right to complain of voter disenfranchisement merely “upon the principle of disqualification in the returning officer”?<sup>221</sup>

Monroe’s uncertainty, however, concerned more than just the facts extending to the legal grounds upon which the dispute should be resolved. “I have not sufficient data to judge of it on general principles, and ‘tis not improbable that even these might be acted on by some [s]tate regulation.”<sup>222</sup> Here, Monroe was recognizing that a promulgated provision of New York law (statute, administrative rule, or constitutional text) might specifically address whether or not to count the Otsego ballots given the particular circumstances of this dispute.<sup>223</sup> If so, Monroe acknowledged that the proper adjudication of this dispute should set aside “general principles” even if one knew what answer they would dictate. General principles of law are to be followed in a dispute of this kind, but only if there is no positive enacted law that supersedes those background general principles.

In this respect, Monroe anticipated an important discussion that has emerged in the wake of *Bush v. Gore* and *Coleman v. Franken*. In the post-2000 debate regarding whether strict or lenient enforcement of election rules is preferable, it has become widely acknowledged that it is better, where possible, to sidestep this debate about “general principles” by relying on specific provisions of state law that address the situation.<sup>224</sup> Thus, scholars urge states to take legislative positions on the debate between strict and lenient enforcement, spelling out their own state-specific resolutions of this debate in as much detail as they can. Insofar as Monroe recognized that it is better to resolve high-stakes disputed elections based on clear rules promulgated in advance rather than by an appeal to “general principles” or (as Madison put it) “right reason,” Monroe was thinking far ahead of his time.

Monroe’s fellow Virginians, Madison and Jefferson, both thought they could figure out what answer “general principles” or “right reason” called for in the New York dispute. Yet as we have seen, even from their detached Virginian perspectives, Jefferson and Madison did not see eye-to-eye on exactly what pure principles of jurisprudence required in this instance. Thus, the gap in the assertion of principles between the Federalists and Clintonians in New York cannot be attributable solely to self-interest.

To be sure, each side in New York advocated its “general principle” based on its partisan position in the particular case. It is ironic, moreover, that in this first major disputed election in U.S. history, each side adopted a jurisprudential posture at odds with its basic principles of political philosophy. The Democratic-Republicans advocated throwing the Otsego votes out, even though philosophically they were more predisposed than the Federalists to enfranchising the average citizen. In this instance, conversely, the Federalists championed voter

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221. *Id.*

222. *Id.*

223. *Id.*

224. See, e.g., Hasen, *supra* note 125, at 82.

enfranchisement-enhancing rules despite their philosophical tendency to be the more “law-and-order” party.<sup>225</sup>

This irony was not lost on the participants themselves. As we have already seen, Hamilton noted the inconsistency between Jay’s pursuit of extralegal measures and his party’s general aversion to rabble-rousing.<sup>226</sup> Troup sarcastically complained that the so-called “friends of the People,” as the Democratic-Republicans liked to call themselves, would favor tossing out the Otsego ballots based on the defect in Smith’s status as sheriff: “The efforts made to prevent the canvassing of these votes . . . upon a mere law quibble are really characteristic of these virtuous protectors of the rights of the people, of the enemies of aristocracy, and the declaimers against ministerial influence.”<sup>227</sup>

Arguing contrary to the usual philosophy of one’s party is, of course, a prominent feature of contemporary election disputes. For example, it was widely observed in the context of the disputed 2008 U.S. Senate election in Minnesota that Al Franken, the Democrat, was favoring a strict enforcement position that would disenfranchise eligible voters, the opposite of the Democratic Party’s usual stance regarding election law. On the other hand, Coleman, the Republican, was championing the lenient enforcement position that his party usually opposes.<sup>228</sup> Similarly, what disturbed observers most about the U.S. Supreme Court’s 5-4 decision in *Bush v. Gore* was that each side of that 5-4 split took a position opposite to its usual jurisprudential stance.<sup>229</sup> The five members of the majority, who were the conservatives on the Court, issued a ruling antithetical to their typical states-rights philosophy and embraced an expansive interpretation of the Equal Protection Clause that they normally would oppose. Conversely, the four liberal dissenters trumpeted a states-rights argument that they usually would find objectionable as a basis for interfering with enforcement of federal equal protection rights.

Thus, one can cite the disputed election of 1792 as the first in a long line of

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225. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 32 (rev. ed. 2009) (“The Federalists . . . tended to oppose any broadening of the franchise; the more egalitarian Jeffersonian Republicans viewed expansion more favorably.”).

226. James Kent’s biographer put the point more positively: the canvassing committee’s decision “gave the angry Federalists an opportunity to pose in a new light as the champions of the people’s freedom.” HORTON, *supra* note 64, at 69. Kent, in particular, changed his tune regarding democratic populism:

Ordinarily the sight of liberty poles filled Kent with disgust. But the pole set up in Cooperstown before the court-house was an exception. In the autumn of 1792, as he visited the outraged shire of Otsego, he viewed it with approval. It was an emblem of the just indignation of the people at the recent attack upon their liberties.

*Id.* at 70.

227. Letter from Robert Troup to John Jay (May 20, 1792), in 3 JAY, *supra* note 134, at 424.

228. See Foley, *supra* note 121.

229. See, e.g., Cass R. Sunstein, *Introduction: Of Law and Politics*, in THE VOTE: BUSH, GORE & THE SUPREME COURT 1 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

cases in which the two warring parties chose whichever jurisprudential position was most convenient for the particular moment. This observation underscores the need for some impartial institution if the dispute is to be decided based on “general principles” rather than unambiguous statutory directives. In the absence of statutory clarity, there is no single objective truth discernible from “general principles” regarding the resolution of election disputes. The views of the Virginians teach us that. Moreover, in the absence of a single truth derivable from “general principles,” partisans can pick whichever version of “general principles” best suits their immediate electoral need.

Our Founding philosophers, Jefferson and Madison, did not have some pure and well-developed theory of how to handle a disputed election. We cannot simply retrieve the Founders’ understanding of what to do in a case like *Bush v. Gore* and apply that Founding Era philosophy to whatever new disputed election occurs in our own time. Instead, the Virginia response to the New York dispute shows, perhaps more than anything, that the Founding philosophy on how to operate a constitutional democracy was incomplete. The Founders did not leave us a roadmap on how to get through a *Bush v. Gore* (or similar dispute) because they themselves were unsettled on how to handle this kind of situation. Jefferson might do one thing, Madison another—for reasons having nothing to do with the taint of partisanship, but simply because their own understanding of “general principles” and “right reason” were insufficient for specifying an answer for the situation at hand. This truth, above all, is why going forward, our constitutional democracy must design new institutions to address this kind of situation.

#### *E. The Clintonian Counteroffensive and the Federalist Response*

Early in the controversy of 1792, it seemed as if there might be some small chance that Clinton would follow Jefferson’s recommendation and graciously accept defeat based on the Otsego ballots.<sup>230</sup> Chancellor Robert Livingston, a leading Clintonian, signer of the Declaration of Independence, and major figure in the state, wrote, “I confess I would have wished that all the votes had been counted whatever might have been the event.”<sup>231</sup> But this position did not hold, and the Clintonians began planning their counterattack. By mid-July, Livingston took the position that “[w]hether the canvassers were right or wrong is no longer a question of any moment . . . their determination is conclusive, nor do I know of any constitutional mode of revising the question.”<sup>232</sup> It appears that Livingston’s opinion was that Clinton had no choice but to accept reelection once the prize was given to him, but this rationalization seems politically expedient. Had Clinton renounced the result in mid-July, surely the leading politicians in the state would have devised a bipartisan way to have the canvassing committee reconvene and revise its ruling. But Clinton in 1792, like Bush in 2000, had no interest in going down that accommodationist road.

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230. See YOUNG, *supra* note 27, at 317.

231. *Id.* at 313.

232. *Id.* at 314.

Taylor recounts the Clintonians' publication of affidavits against Cooper on June 16, 1792.<sup>233</sup> "The affidavits collectively depicted Cooper as an overbearing landlord and unscrupulous judge bullying his settlers with his formidable combination of economic and judicial power, packing the polls with unqualified voters, and intimidating Clintonian pollwatchers."<sup>234</sup> The Federalists counterpunched with their own affidavits. One witness changed his story three times, first espousing Clintonian attacks on Cooper, then supporting Cooper, and finally attacking him again.<sup>235</sup> It is difficult from this vantage, over two hundred years later, to determine the truth of the charges and countercharges. At the time, no objective tribunal was available to adjudicate the matter.<sup>236</sup>

The fair-minded Hammond certainly describes Cooper's behavior as improper, unlawful, and contrary to the operation of a free and fair election:

The depositions of these witnesses . . . certainly do show gross misconduct in him as a citizen, during the canvass in Otsego, at the election between Jay and Clinton. It was deposed that he encouraged illegal voting in favor of Mr. Jay; that he knowingly had caused men to vote who were not freeholders; that he threatened voters with suits who expressed a wish to vote for Mr. Clinton, and that he menaced a Mr. Cannon, who came to the polls to challenge illegal voters, that if he challenged any one, he (the judge,) would forthwith commit him to jail.<sup>237</sup>

But as bad as Cooper's conduct was, in many people's minds it did not make the case for throwing out all the county's ballots because of the sheriff's defect.<sup>238</sup> One historian sympathetic to the Clintonian position, who thought the evidence supported the charges against Cooper, also thought that "the Federalists established by far the better case" concerning the acceptability of ballots from a de facto sheriff.<sup>239</sup> The Federalists managed to avoid a legislative condemnation of Cooper through some parliamentary maneuvering; they were able to postpone a vote until Cooper himself had a chance to testify, but that testimony did not occur while the Republicans maintained control.<sup>240</sup> In the next election, the Federalists gained a majority, and by then they would not condemn their Otsego ally.<sup>241</sup>

The much larger question than the fate of Cooper's reputation was what, if

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233. TAYLOR, *supra* note 27, at 183.

234. *Id.*

235. *Id.* at 184-85.

236. Although the veracity of the affidavits attacking Cooper was never determined, the affiants found themselves criminal defendants in Cooper's court after politically motivated indictments were issued for crimes ranging from keeping a disorderly house to rape. *Id.* at 185-86.

237. HAMMOND, *supra* note 27, at 76-77.

238. See TAYLOR, *supra* note 27, at 192.

239. YOUNG, *supra* note 27, at 320-21.

240. *Id.* at 322.

241. *Id.* at 322-23.

anything, were the Federalists ultimately going to do about what they still perceived as the canvassing committee's blatant theft of Jay's victory? Were they going to go forward with Jay's plan for a single-purpose constitutional convention despite Hamilton's strong objections? Or were they going to try some other means, before the next gubernatorial election in 1795, to unseat Clinton from office? Or would they simply back down altogether and wait patiently for that next election, hoping for decisive but delayed vindication at the ballot box?

In the end, Hamilton got his way. The Federalists abandoned the convention idea and settled instead for legislative grandstanding as a public relations strategy with an eye to the next election.<sup>242</sup> In the summer and fall of 1792, the Federalists knew that they did not control the state legislature.<sup>243</sup> Still, with James Kent in the lead, they pursued charges of impeachment against the canvassing committee and demanded a legislative investigation,<sup>244</sup> which lasted until January 1793.<sup>245</sup> The Clintonian majority, not surprisingly, exonerated the canvassers of any wrongdoing, but the investigation at least allowed the Federalists to air their charges.<sup>246</sup> The strategy partially backfired, as the Clintonians retaliated by conducting their own legislative investigation of Cooper and his inappropriately domineering behavior in Otsego.<sup>247</sup> These proceedings lasted another few months and would have led to a public censure of Cooper's behavior, but for the successful delay tactics of the Federalists until such time as they gained legislative control.<sup>248</sup>

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242. In Hammond's words, the Federalists chose their legislative strategy "for the purpose of rendering the governor odious, in consequences of the rejection of the Otsego votes." HAMMOND, *supra* note 27, at 77.

243. YOUNG, *supra* note 27, at 310.

244. In arguing for impeachment, Kent made this case to the legislature:

It is generally understood that about 1100 VOTES of the FREE MEN of this STATE were committed to the fire unopened, and the scale of election turned. Such a calamitous event was never surely within the contemplation of either our constitution or laws. If both of them had been duly observed, such an event never could have occurred. Somebody therefore is highly in the wrong, and somebody is highly responsible for maladministration. If such an occurrence had not propagated alarm and enquiry among the people of this state, it would have argued that they either knew not the right of suffrage, or were insensible to its importance.

N.Y. DAILY ADVER., Dec. 27, 1792.

245. YOUNG, *supra* note 27, at 320.

246. *Id.* at 320-21.

247. *Id.* at 321-22.

248. After the Federalists gained control of the legislature in April 1793, they adopted a resolution declaring that the complaints against Cooper's conduct had been "frivolous and vexatious." HAMMOND, *supra* note 27, at 82. But they did not then attempt to unseat Clinton even though his new gubernatorial term would not end until after the election of 1795. See ALEXANDER, *supra* note 148, at 61-62. They did attempt to deprive Governor Clinton of some powers of appointment, a partisan move that came back to haunt them once Jay won in 1795. See *id.* Hammond also chided the Federalists for their "unquestionably party vote" in attempting to

If the Federalists had been in control of the legislature in the summer of 1792, would they have used this power in an effort to overturn the canvassing committee's decision, by means of calling a constitutional convention for this single purpose or otherwise? Hammond thought not: "I do not believe that such men as James Kent and many other federal members would, if they had had the power, have ventured at that time, by legislative enactments, to have declared the election of Gov. Clinton[] void. . . ."<sup>249</sup> Hammond has the advantage of temporal proximity, but the evidence on this point is hardly conclusive. The sentiment for unseating Clinton was very strong,<sup>250</sup> and it just might have been strong enough to propel the Federalists into legislative action if they had possessed that lever to push. In any event, one can never answer this kind of historical counterfactual question with any degree of certainty.

What actually happened is that Jay decisively won the gubernatorial election of 1795.<sup>251</sup> Clinton did not even run again that year.<sup>252</sup> This electoral vindication of Jay proved Hamilton's strategy successful. Jay, Kent, and the other Federalists who felt robbed by the canvassing committee did not achieve in 1792 the electoral justice they were looking for in their initial responses to the committee's ruling. But by cooling their emotions and seeking eventual electoral vindication instead of immediate electoral justice, the Federalists were able the next time to gain the prize that they had been denied.

## V. THE AFTERMATH OF THE DISPUTE

Jay was elected governor in 1795<sup>253</sup> and re-elected in 1798,<sup>254</sup> using the same election laws that had defeated him in 1792. It was not until 1799 that the Federalists, who were still dominant in the state legislature but who were by then facing political storm clouds on the horizon,<sup>255</sup> made changes to the rules for canvassing votes in a gubernatorial election.<sup>256</sup> The changes are noteworthy, for they indicate some effort to correct the defects that led to the disaster of 1792. But these changes did not include an "equally biased" tribunal along the lines that Kent thought necessary in order to assure fairness to both parties in an electoral

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condemn the legislative investigation of Cooper. HAMMOND, *supra* note 27, at 82-83. Whether or not the charges against Cooper for misconduct at the Otsego polls in 1792 were ever definitively proved to the extent that the Clintonians claimed, Hammond protests that "surely [they were] not frivolous." *Id.* at 83 (emphasis in original).

249. HAMMOND, *supra* note 27, at 77.

250. See ALEXANDER, *supra* note 148, at 60-61.

251. *See id.* at 65.

252. *Id.* at 63.

253. *Id.* at 65.

254. *Id.* at 82-83.

255. The Republicans' desire for less centralized government was gaining popularity with voters. *See* HAMMOND, *supra* note 27, at 115-20.

256. *See* Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362.

dispute of this nature.<sup>257</sup> Even Kent himself apparently never pushed for this sort of reform, despite his recognition of its necessity. His failure to do so, along with the collective failure of his Founding Generation in this regard, is the major legacy of this episode. He and they saw partisan bias as the problem underlying the canvassing committee's decision, but he and they were unable to develop an institutional mechanism to solve that problem.

One change that the 1799 law made was to remove county sheriffs from the canvassing process.<sup>258</sup> More than that, however, the 1799 law altered the relationship between local and statewide officials in the counting and canvassing of gubernatorial ballots. Rather than having the local ballots themselves transmitted to the secretary of state, a procedure which triggered the 1792 dispute, the 1799 law required that the "inspectors" of the polls in each locality "publicly" canvass the ballots themselves and "set down in writing" the canvassed votes for the gubernatorial candidates.<sup>259</sup> The statute then obligated these local "boards of inspection" to certify their written tallies and submit these certificates to the county clerk, as opposed to the sheriff.<sup>260</sup> Thereafter, the county clerk was required to submit these local certificates, instead of the ballots themselves, to the secretary of state.<sup>261</sup>

Given these provisions of the 1799 statute, the nature of the statewide canvass necessarily was different—and much more limited—than it had been in 1792. The statewide canvassers could only "aggregate" all the local tallies and review the local paperwork for superficial accuracy.<sup>262</sup> Unlike in 1792, they had no ability to decide which local ballots would or would not be counted. In fact, the 1799 statute ordered the local inspectors, "immediately" after completing the certificates of their local canvass, to "destroy the poll books and ballots made and taken at any such election."<sup>263</sup> Thus, although the Federalists in 1792 had been enraged by the immediate destruction of the ballots by the statewide canvassing committee, they now wanted the local officials to engage in the same kind of immediate ballot destruction so the statewide canvassers could never obtain them.

The 1799 statute also changed the identity of the statewide officials responsible for this narrowly circumscribed statewide canvass. No longer was there a joint canvassing committee with six members from each chamber of the state legislature. Instead, a new state canvassing board consisted of three executive officials: the secretary of state, the treasurer, and the comptroller.<sup>264</sup>

Gone, too, was the earlier statutory language making the canvassing

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257. See KENT, *supra* note 62, at 44-45. A current proposal to implement the kind of tribunal that Kent suggested is outlined in Foley, *supra* note 67.

258. See Act of Mar. 27, 1799, at 51, 1799 N.Y. Laws 362, 362-63.

259. *Id.*

260. *Id.* at 363.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

committee's 1792 ruling "binding and conclusive."<sup>265</sup> The new 1799 statute said "all questions" concerning the canvass "shall be determined by the opinion of a majority of the [new three-member] board."<sup>266</sup> The combination of removing the "binding and conclusive" language and the more ministerial nature of the three-person board's authority paved the way for the development of judicial review over this board's decisions during the nineteenth century.

By making these changes, the Federalists may have thought that they had immunized canvassing process from the kind of partisan bias that tainted the 1792 election. If so, however, they were shortsighted. To be sure, the requirement of "publicly" canvassing at the local level was significant. As our nation has learned repeatedly throughout its history, the value of transparency in the administration of the electoral process is not to be underestimated. During the dispute over the 2000 presidential election in Florida, this lesson was learned most forcefully when the so-called "Brooks Brothers riot" occurred after the local board in Miami decided to recount ballots behind closed doors.<sup>267</sup> Eight years later, in the dispute over Minnesota's U.S. Senate election, the lesson was learned much more positively when the state canvassing board conducted its recount proceedings in full public view, including televising it over the Internet.<sup>268</sup>

But the Federalists of 1799 were naïve if they thought that transparent canvassing at the local level, with nothing more than ministerial tallying of local certificates by state officials, would be enough to prevent partisan bias from tainting the canvassing process in a high-stakes election with an apparently razor-thin margin. As ensuing years would eventually show, it would be possible in some circumstances to claim that partisan bias tainted the decisions of local election officials even if those decisions were required to be on public display.<sup>269</sup> Moreover, if a dispute of statewide significance emerged over the allegedly improper conduct of local election officials, then what statewide institution would adjudicate that dispute, and would that institution itself be immune from partisan bias? Even if the underlying ballots were immediately destroyed (as required by the 1799 statute),<sup>270</sup> creative lawyers, working on behalf of competitive candidates determined to press any claim that might prevail, could concoct arguments that the local error required a new election or some other remedy. If

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265. Compare Act of Feb. 13, 1787, ch. 15, 1787 N.Y. Laws 371, 379, with Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362.

266. Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362, 364.

267. See Dexter Filkins & Dana Canedy, *Protest Influenced Miami-Dade's Decision to Stop Recount*, N.Y. TIMES, Nov. 24, 2000, at A41.

268. Foley, *supra* note 121.

269. For example, the famous photograph of a Florida ballot counter lifting his glasses to hold a punch-card ballot up to the light, readily available on a "Google images search," did nothing to assuage fears that this exercise of local discretion would improperly swing the 2000 presidential election for Gore. It was precisely this fear that caused the U.S. Supreme Court to rule that these local officials, despite the transparency of the process, had excessive administrative discretion under the Fourteenth Amendment.

270. Act of Mar. 27, 1799, ch. 51, 1799 N.Y. Laws 362, 363.

the statewide institution hearing that argument was predisposed to be sympathetic because of its members' partisan affiliations, then the risk of partisanship tainting the outcome of the election remained despite the reforms of 1799.

It would not be until the middle of the nineteenth century that New York statutory law would build explicit bipartisan representation into the structure of its local electoral institutions<sup>271</sup>—and not until 1894 that New York would put this requirement of bipartisan representation into its constitution.<sup>272</sup> In 1799, however, the Founding Generation was not prepared to adopt this type of measure, despite Kent's prescient recognition of the need for a body with bipartisan balance.<sup>273</sup>

To build bipartisanship into the structure of an official canvassing board, whether state or local, would be to acknowledge the permanence—even acceptability—of two-party electoral competition to a degree that the Founders were never able to do. Kent might have wanted an equal number of Federalists and Clintonians on the statewide canvassing committee,<sup>274</sup> but he never said he wanted a law that would have specifically required an equal number of members from each party on whatever tribunal was authorized to decide whether or not to count the disputed Otsego ballots. To appoint a member of an adjudicatory tribunal (which Kent considered akin to a court) as an explicit representative or affiliate of a political party would have been anathema to his and the Founding Generation's sense of civic and judicial virtue. The temptation to use the power of an adjudicatory office to achieve a partisan victory should be overcome by a resolute commitment to the paramount obligation to act honorably in office.

Ultimately, the Founding Generation saw the problem in 1792 as primarily a personal deficiency in the degree of political virtue possessed by the members of the canvassing committee and those who appointed them, rather than a structural deficiency in the constitutional apparatus designed to compensate for the fact that "men are not angels,"<sup>275</sup> and politicians are not always honorable. By 1799, the Founding Generation surely knew that its system of government was afflicted by partisanship. Yet the Founders still hoped that at crucial moments partisan pressures and impulses would be resisted by honorable men acting on the basis of impartial virtue. They did not want to surrender to the cynical expectation that all political conduct, at least in the midst of electoral competition for premier positions such as governor or the President, would be based on partisanship rather than virtue.

The best indication of the desire to hold on to the pre-partisan sense of obligation to impartial virtue comes from Jay himself. The setting was the

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271. Delos F. Wilcox, *Party Government in the Cities of New York*, 4 POL. SCI. Q. 682 (1899).

272. CHARLES Z. LINCOLN, 3 THE CONSTITUTIONAL HISTORY OF NEW YORK: 1894-1905, at 129-33 (1906).

273. *See supra* text accompanying note 67.

274. *See supra* text accompanying notes 66-67.

275. THE FEDERALIST NO. 51, at 262 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

presidential election of 1800. By May of that year, it became apparent that New York would prove decisive in the Electoral College battle between Adams, the Federalist candidate for reelection, and Jefferson, the Democratic-Republican challenger.<sup>276</sup> During the previous month's legislative elections in New York, the Democratic-Republicans won a decisive majority of seats.<sup>277</sup> Because New York at the time permitted its legislature to appoint the state's presidential electors, everyone knew that all of New York's Electoral College votes were poised to go to Jefferson, not Adams.<sup>278</sup> In response, Hamilton formulated a plan that would enable Adams to win at least some of New York's Electoral College votes: Governor Jay would call the lame-duck, Federalist-controlled, legislature back into session to pass a statute that would divide the state into electoral districts, resulting in a popular vote for one of the state's presidential electors in each district.<sup>279</sup> Because certain parts of the state were still dominated by Federalists, the lame-duck legislature could draw the district lines in a way that would position Adams to win as many as half of the state's twelve Electoral College votes,<sup>280</sup> thereby likely giving Adams an outright overall Electoral College majority nationwide. It was an ingenuous scheme, one worthy of Hamilton as the brilliant partisan tactician, who raised it with Jay in a letter.<sup>281</sup>

Jay, to his credit, would have none of it. He wrote on the back of Hamilton's letter: "Proposing a measure for party purposes, which I think it would not become me to adopt."<sup>282</sup> In 1800, therefore, Jay was able to resist partisanship and act instead based on his conception of impartial virtue. His decision made a difference. If he had cooperated, and the lame-duck legislature had acted according to Hamilton's plan, then Adams would have won a majority of Electoral College votes.<sup>283</sup>

Jay's decision to act honorably in 1800 may have been affected by the partisan cause of his own defeat in 1792. At least one historian has suggested this link:

Jay was a stalwart Federalist. . . . [H]e regarded the advent of Jefferson and his ideas with as much alarm as Hamilton, and he knew as well as Hamilton that the adoption of the district plan of choosing electors would probably defeat the Virginian; but to call an extra session of the Legislature for the purpose indicated by Hamilton, *would defeat the*

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276. See WEISBERGER, *supra* note 12, at 229.

277. 3 JAY, *supra* note 134, at 411.

278. See HAMMOND, *supra* note 27, at 144; WEISBERGER, *supra* note 12, at 238-39.

279. See 3 JAY, *supra* note 134, at 412-13.

280. Even if Adams could not win half of the electoral votes, districting would have assured him at least four electoral votes. See HAMMOND, *supra* note 27, at 144-45.

281. 3 JAY, *supra* note 134, at 412-14.

282. HAMMOND, *supra* note 27, at 145.

283. 3 JAY, *supra* note 134, at 411-14. As it was, Adams fell short, and Jefferson ended up in a tie with Burr, which sent the election to the U.S. House of Representatives. WEISBERGER, *supra* note 12, at 256-57.

*expressed will of the people as much as the action of the state canvassers defeated it in 1792.*<sup>284</sup>

The point of this passage is clear. It is not that Jay was lacking in strong partisan impulses; rather, he was able to overcome those impulses because of his fidelity to what he believed honor required of him, and his sense of honor was reinforced by his own experience in 1792. Rather than making Jay vengeful, his defeat at the hands of the canvassing committee bolstered his own commitment to do the right thing when he was in a similar position to affect the outcome of a major election. As this historian summed it up, Jay “wisely refused to do what the people of the State had so generally and properly condemned in the canvassers.”<sup>285</sup>

But Jay’s heroic act of virtue and resistance of partisanship in 1800 signifies the end of an era rather than an example that others would follow in years to come. “[N]ot a governor who followed Jay in these eventful years,” the same historian acknowledged, “would have declined under similar circumstances to concur in Hamilton’s suggestion.”<sup>286</sup> The use of official power for partisan electoral objectives quickly became the norm and expectation.

Yet the election law of 1799 was not written to handle that development. It was a product of an earlier era, when there was still some lingering sentiment that officials might act like Jay did in 1800. The Founding Generation simply did not equip New York, nor the nation, for what was needed in a world where partisanship reigned with no resistance from virtue.

## VI. THE LESSONS FOR US OF 1792

Our own generation knows what it is like to have partisanship—or at least the appearance of it—taint the adjudication of a major disputed election. Whether we supported Bush or Gore, we were embarrassed by the fact that the U.S. Supreme Court split 5-4 and did so after the Florida Supreme Court split 4-3, with both tribunals (despite their opposite outcomes) seemingly affected by the partisan allegiances of their majorities. We can easily imagine, then, how Jay and his supporters must have felt when they saw themselves dealt the injustice of a partisan 7-4 canvassing committee decision. We can imagine, too, the embarrassment that some of Clinton’s supporters, including his Virginian allies, felt by the partisan way in which he received his electoral victory.

From our vantage point, now a decade after *Bush v. Gore*, we know also the experience of letting several electoral cycles pass without addressing the institutional inadequacies that enable the taint of partisanship to occur. To be sure, we have eliminated hanging chads, butterfly ballots, and some of the other features of our voting process that provided the foundation for *Bush v. Gore* to occur. But those operational reforms are much like eliminating sheriffs from the voting process, as New York did after 1792. Changing the rules for operating

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284. ALEXANDER, *supra* note 148, at 98-99 (emphasis added).

285. *Id.* at 93.

286. *Id.*

the voting process does not by itself prevent partisan bias from controlling the resolution of any dispute that might arise concerning the process. Some grounds for a potential dispute are gone. For example, there is now no more fighting over hanging chads, just like there is no more fighting over the transmission of ballots by sheriffs whose commissions have expired. Yet, as we surely understand after Minnesota's experience in 2008, eliminating some grounds for a potential dispute does not eradicate all such grounds. Franken and Coleman learned that they could conduct the same basic dispute over absentee ballots that Bush and Gore did over hanging chads.<sup>287</sup> Thus, as a nation, we stand today as New York did in 1800—the electoral reforms that we have adopted in response to the relatively recent crisis still leave us vulnerable to a new episode in which the partisan bias of incumbent officials dictates the outcome of a dispute over the rules governing a major election.

Now a decade into the twenty-first century, we are unlikely to find a John Jay whose virtue in office would save us from this institutional vulnerability. As a nation, since 1800 we have lived through two centuries of incessant two-party electoral competition for the presidency and other high offices. We know also that this two-party competition is not merely permanent; it is, in an important sense not recognized by the Founders, appropriate. Today, neither Democrats nor Republicans are disloyal to the Republic and its Constitution. By contrast, in the 1790s, both Federalists and Democratic-Republicans thought the other party was betraying the principles they had just enshrined in 1787. Today, Democrats and Republicans offer the electorate a choice between left-of-center and right-of-center policies, which the electorate is entitled to oscillate between depending on its collective mood. Thus, we can accept in a way that the Founders could not that politicians inevitably will be partisans—and therefore, fair electoral competition between the two parties requires an institution that protects the resolution of disputed elections from becoming hijacked by politicians from either party seeking an electoral advantage. Unlike the Founders living under the beginning of their own regime in 1790s, we can readily see now that we lack this kind of institution, but that we very much need one.

Looking to the future, as we endeavor to design this missing piece of constitutional architecture and figure out how procedurally to put it into place, we can ask ourselves what particular lessons we should draw from New York's disputed election of 1792. We should not attempt, of course, to learn from this one episode alone. We should instead consider it in the context of the full sweep of disputed elections in U.S. history.<sup>288</sup> That history includes, most prominently,

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287. In 2010, we are again learning that, much to our surprise, it is also possible to re-wage these basic battles over the spelling of write-in candidates. *See supra* note 120.

288. The historian Alexander, writing in 1906, likened the furor over the canvassing committee's ruling in 1792 as comparable to the commotion that would later occur in the Hayes-Tilden election of 1876: “[T]he people of the State were aroused to the wildest passion of rage, recalling the famous Tilden-Hayes controversy three-quarters of a century later.” ALEXANDER, *supra* note 148, at 59. Federalists called Clinton “the Usurper,” just as Democrats later would call Hayes “His Fraudulence.” *Id.* at 61.

the Hayes-Tilden election at the time of the nation's centennial. It now also encompasses *Bush v. Gore* as well as, most recently, *Coleman v. Franken*. The future should be built on lessons learned from the entire past.

Still, the Clinton-Jay dispute of 1792 was the nation's first major dispute of its kind and, therefore, teaches some distinctive truths. Some of these truths, although significant, are less weighty than others. One such truth is the inevitable propensity towards litigation as partisans attempt to prevail on legal grounds when a close election is mired in a ballot-counting dispute. As we have seen, large legal teams were assembled on both sides in 1792, long before they were in 2000 or 2008. When designing an electoral dispute resolution system for the future, we should accept this propensity rather than wish it would disappear.

Indeed, we should be grateful that candidates turn to lawyers rather than soldiers to fight their battles for control of the coveted high offices during electoral disputes. Relying on attorneys indicates a willingness to settle the dispute according to the rule of law rather than through the force of arms. Perhaps the most positive feature of our nation's experience with disputed elections is that, apart from some notable exceptions in the nineteenth century,<sup>289</sup> we have largely escaped the need to rely on troops to quell civil unrest during a dispute over an electoral outcome. Even when candidates have been convinced that the legal procedures used to resolve the dispute were deeply flawed (or, worse, corrupted by partisan bias), they have largely decided to accept the result that the legal procedures generated *simply because the result emanated from those legal procedures*.

Respect for the rule of law is usually enough to cause a candidate to abide by the deeply flawed result. The Hayes-Tilden dispute was one such situation. Tilden considered the 8-7 vote of the Electoral Commission against him both corrupt and unconstitutional—and yet the Commission had been established by a procedurally proper act of Congress, and its constitutionality had not been challenged in a judicial forum.<sup>290</sup> Thus, the Commission's ruling had all the authority of a final Supreme Court decree, and Tilden was not about to challenge it. Likewise, Gore and his advisers undoubtedly considered the majority decision in *Bush v. Gore* egregiously wrong if not corrupt, yet it was the product of a conventional writ of certiorari to the Court and thus within the scope of the Court's jurisdiction under law (however improperly that jurisdiction might have been exercised).<sup>291</sup>

In much the same way, Jay and his legal advisers eventually accepted the canvassing committee's 7-4 ruling (even though they considered it egregiously corrupt) because it fell within the committee's jurisdiction under the then-existing election law. In this respect, as some of them recognized at the time, they set an important precedent in favor of settling disputed elections through the rule of law

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289. The book that Steven Huefner and I are writing will discuss these nineteenth-century exceptions, including the so-called Buckshot War in Pennsylvania and the Brooks-Baxter War in Arkansas. Our historical research on those episodes is currently in progress.

290. See Colvin & Foley, *supra* note 2, at 515-16.

291. See generally TOOBIN, *supra* note 74.

rather than by resorting to violence. Consider how differently American history might have unfolded if Jay had captured the governor's office through the use of force in 1792, or even if he had simply attempted to do so but his use of force had been crushed. Jay's self-restraint, conversely, may have helped to pave the way for similar self-restraint by Tilden and Gore, among others.

Another lesson to be learned from the Clinton-Jay dispute of 1792 concerns the deep-rooted nature of the jurisprudential debate between strict and lenient enforcement of election statutes. As a review of the 1792 dispute reveals, this basic jurisprudential debate has been with us from the very beginning. The 1792 dispute also demonstrates that this jurisprudential debate involves competing interpretations of our nation's most elementary commitment to the existence of democratic elections. Proponents of both strict and lenient enforcement appeal to the fundamental value of a free and fair vote among citizens. Yet each side of this jurisprudential debate appeals to this fundamental value in a different way.

As a nation, we are essentially stuck in the same place regarding this debate as we were in 1792. The arguments on each side in 2000 and 2008 between strict and lenient enforcement were not much more advanced or sophisticated than they were in 1792. Bush and Franken urged strict enforcement to protect the integrity of the voting process, just as Clinton's supporters did in 1792, and neither added significantly to that side of the debate to what Randolph eloquently wrote on behalf of Clinton. Similarly, Gore and Coleman urged lenient enforcement, like Jay's team did, but none of their arguments against voter disenfranchisement were more nuanced or elaborate than what Trumbull said in support of Jay.

Thus, in the future, if the debate between strict and lenient enforcement is to move beyond the same recitation of these two ancient arguments, there will need to be some mechanism to explain the circumstances in which strict enforcement should prevail as opposed to where lenient enforcement controls. A promising development along these lines is the idea that a respected jurisprudential body like the American Law Institute might formulate a code or set of principles to elucidate these respective situations. This nationally formulated code or set of principles might then become adopted seriatim in the several states. This could become increasingly refined as more and more states settle more and more disputes according to precedents set within this evolving body of collective wisdom, rather than falling back upon the generic debate between strict and lenient enforcement. Hopefully, well-reasoned positive law for the resolution of disputed elections might emerge from this process, along the lines hinted at by James Monroe's observation of the 1792 dispute in New York.

But even if a well-reasoned corpus of law emerged from this kind of process, each state would need an institution that could be entrusted with the fair-minded and evenhanded application of this jurisprudence to whatever particular disputed election might next occur. As James Kent could attest, what good is a well-reasoned corpus of election law if it is susceptible to manipulation by an authoritative tribunal bent on achieving a partisan outcome? Thus, a major lesson to be learned from 1792 is one that we already know: we need impartial institutions to adjudicate high-stake disputed elections like the presidential election of 2000 or Minnesota's U.S. Senate election of 2008. We need these impartial institutions to be structured so that they will not be, or appear to be,

predisposed to tilt their decisions towards one candidate or another based on the partisanship of the governing body.

As important as this institutional lesson is, perhaps an even more important lesson to learn from 1792 is why our nation was not given this kind of institution from the beginning and thus why, insofar as we still do not have one for disputed presidential elections, we are obligated to create one for ourselves and our posterity. Simply put, two-party electoral politics were too new to the Founders in the 1790s for them to address this institutional need. That fact, plus their inexperience with chief executive elections, meant that they were entirely unprepared for partisan influences in a disputed gubernatorial—or presidential—election. They gave no thought to what tribunal would be appropriate in the event that the outcome of a presidential election turned on a dispute over ballots cast for a state’s presidential electors.

The fact that the Founders failed to anticipate this need does not mean that it is not necessary. On the contrary, members of the Founding Generation who lived through the first few decades of the nineteenth century began to understand their omission and its significance. Late in life, Madison himself acknowledged that the Framers of the Constitution had given too little attention to the topic of presidential elections.<sup>292</sup>

Even more on point, when Kent wrote his famous *Commentaries on American Law* in the 1820s, he expressly acknowledged that the Framers had failed to consider the possibility of a partisan dispute in the context of counting Electoral College votes for president. Undoubtedly reflecting his own experience in New York’s disputed gubernatorial election of 1792, Kent ominously wrote that a similar type of dispute in a presidential election “will eventually test the goodness[] and try the strength of the [C]onstitution.”<sup>293</sup> In other words, Kent knew that there was a serious hole in the electoral infrastructure created by the Constitution and that the Republic would be vulnerable unless and until this gap were filled.

A few years later, another prominent constitutional scholar of the early Republic, Joseph Story, picked up on Kent’s point and amplified it. Story himself had lived through a disputed gubernatorial election in Massachusetts in 1806—which, like New York’s in 1792, had become mired in partisan efforts to manipulate the outcome by disqualifying ballots of eligible voters. Knowing his own experience there, as well as New York’s earlier episode, Story expressed even more concern about the possibility of a disputed presidential election than Kent had. Although the Framers of the Constitution had made “[n]o provision”

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292. See Donald O. Dewey, *Madison’s Views on Electoral Reform*, 15 W. POL. Q. 140 (1962) (discussing letters Madison wrote in the 1820s advocating reforming the Electoral College system). Madison’s letter of August 23, 1823 to George Hay expressly acknowledged Madison’s subsequent judgment that the Constitutional Convention of 1787 did not give adequate attention to the method of presidential elections: “as the final arrangement [for presidential elections] took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies.”

293. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 273-74 (3d ed. 1836) (1826).

for the problem because it simply had not occurred to them, Story found it “easily to be conceived that very delicate and interesting questions may occur, fit to be debated and decided by some deliberative body.”<sup>294</sup>

Therefore, the point is that we must build for the future what the Founders themselves were unable to build for us. In doing so, we would not be contravening their vision for a well-ordered republic. Instead, by adding a missing but crucial piece of constitutional architecture that they omitted, we would be enhancing the project of constitutional democracy that they began for us.

Madison, Jay, Kent, and the other Founders all wanted the operation of constitutional democracy to satisfy justice according to impartial standards. They emphatically did not want their handiwork to become sullied by partisan avarice. Jay, the author of New York’s constitution, certainly did not anticipate that the competition to win a gubernatorial election would become an unfair fight because of partisan manipulation of the institutions established under his constitution.

It turns out that the Founders did not know how to achieve their own objectives in the context of a disputed election for chief executive. Only later would Founders, like Madison and Kent, recognize the need to update their project. Therefore, accepting the invitation of these Founders themselves, we must complete their own work by adding the kind of impartial institution for adjudicating disputed elections that they originally could not foresee as necessary.

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294. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE U.S. 327 (1833).

## APPENDIX

### Timeline of 1792 Election Dispute

Jan. 13	Smith sends resignation
Feb. 18	Smith's commission expires
March 30	Gilbert's commission issued
April 3	Smith elected town supervisor
April 24-28	balloting; Smith supervises polls
April 30	Van Rensselaer gives commission to Cooper
May 1	in new job, Smith rules on ballots
April 29-May 3	ballots in Smith and Cooper's store
May 3	as sheriff, Smith deputizes Goes
May 11	Cooper gives Gilbert commission
May 29-June 12	canvassing committee meets
June 12	Federalists begin to explore options
June 15	"Gracchus" calls for public agitation; unrest begins
June 27-29	Madison, Monroe write their views about the NY dispute
July 1	Clinton inaugurated for new term
July 2	Jay in Albany seems willing to challenge Clinton's victory
July 10	King writes of Jay's single-purpose convention plan
July 16	Jay in New York City backs away from challenge
July 25	Hamilton writes King to oppose Jay's convention plan
Aug. 24	Troup tries to rekindle Federalist challenge; Hamilton nixes it

# **“CELEBRATING” THE TENTH ANNIVERSARY OF THE 2000 ELECTION CONTROVERSY: WHAT THE WORLD CAN LEARN FROM THE RECENT HISTORY OF ELECTION DYSFUNCTION IN THE UNITED STATES**

NATHANIEL PERSILY\*

## **INTRODUCTION**

For scholars in the United States who study election law and administration, the 2000 presidential election represented a watershed event. It humbled those who thought that the world’s leading democracy had mastered the mechanics of running an election. It also generated interest to look outward for best practices and models to emulate. When U.S. scholars and reformers did so, however, we realized that certain intransigent structural features of the U.S. political system made reform particularly challenging. By highlighting these obstacles, however, this exploration of different modes of administration lent itself to an assessment of the various dimensions of the problem that all democracies encounter. This Article describes the multiple facets of the election administration “problem” that all democracies confront, in light of the decade of introspection the United States has undertaken.

This Article begins by summarizing the controversy that led to the current era of reform of the U.S. electoral system. It then moves to a discussion of the categories of administrative and technical challenges that all successful democracies must confront on some level. It then concludes with a description of metrics by which we can measure democratic success.

Before entering into that discussion, it may be worth summarizing three features of the U.S. electoral system which exist to a greater or lesser extent in other countries, but which, in combination, make reform particularly formidable for the United States. The first glaring institutional feature evident to even the most casual observer of the U.S. electoral system is the extreme decentralization of administrative responsibilities and policymaking.<sup>1</sup> Most decisions concerning

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1. ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS 1 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34363.pdf>; HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 1 (2009); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 952 (2005); George M. Guess, *Dysfunctional Decentralization: Electoral System Performance in Theory and Practice* 6 (Ctr. for Democracy and Election Mgmt., Working Paper No. 6, Apr. 20, 2009), available at <http://www1.american.edu/ia/cdem/pdfs/Dysfunctional%20Decentralization%204-20.pdf>.

election administration are made at the local, usually county, level.<sup>2</sup> Localities are most often in charge of decisions concerning ballot design and technology, as well as those dealing with polling place allocation and administration.<sup>3</sup> The result is a patchwork quilt where the quality of democracy often varies according to the fortuity as to where one lives.<sup>4</sup>

Related to the emphasis on localized control is the reliance on relatively untrained volunteers as the point of contact for most voters on Election Day. For the most part, the people manning the polling places and overseeing the voting process are unpaid volunteers who have had minimal (a few hours worth of) training.<sup>5</sup> In contrast to countries where civil servants administer the polls or citizens are chosen by lot,<sup>6</sup> the United States relies on volunteers, often individuals chosen or courted by the political party leaders competing in the election.<sup>7</sup>

Indeed, the extent to which partisans—either elected or appointed—are in charge of U.S. elections at the state level sets the United States apart from virtually all other democracies.<sup>8</sup> This unenviable distinction seems to be the most entrenched and pernicious of the three pathologies—excessive decentralization,

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2. FISCHER & COLEMAN, *supra* note 1, at 1.

3. *Id.*; U.S. *Elections Procedures: Reforming the System Will Help America Vote Act*, AMERICA.GOV (Apr. 2, 2008), <http://www.america.gov/st/usg-english/2008/April/20080423224318eaifas0.8196635.html>.

4. See Hasen, *supra* note 1, at 952; see also David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. OF POL'Y RES. 1257, 1258 (2006) (identifying different reasons why elections are implemented differently in different locations).

5. See Hasen, *supra* note 1, at 953; see also Deborah Hastings, *High Voter Turnout Ups Risk of Election Day Errors*, USA TODAY, Feb. 25, 2008, available at [http://www.usatoday.com/news/politics/2008-02-24-pollworker-problems\\_N.htm](http://www.usatoday.com/news/politics/2008-02-24-pollworker-problems_N.htm); Alan Wirzbicki, *Lines, Malfunctions, and Untrained Poll Workers Plague Some States*, BOS. GLOBE, Nov. 8, 2006, available at [http://www.boston.com/news/nation/articles/2006/11/08/lines\\_malfunctions\\_and\\_untrained\\_poll\\_workers\\_plague\\_some\\_states/](http://www.boston.com/news/nation/articles/2006/11/08/lines_malfunctions_and_untrained_poll_workers_plague_some_states/); Michael C. Dorf, *Florida Strikes Again: What the Latest Election Snafu Says About Machines and Humans*, FINDLAW (Sept. 18, 2002), <http://writ.news.findlaw.com/dorf/20020918.html>; Heather Gerken, *The Invisible Election*, ELECTION L. BLOG (Nov. 16, 2008, 5:10 PM), <http://electionlawblog.org/archives/012471.html>.

6. CTR. FOR DEMOCRACY & ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 55 (2005), available at [http://www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf).

7. See Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 730 (2008); see also Kimball & Kropf, *supra* note 4, at 1261 (finding that most local election officials are partisan elected administrators).

8. R. Michael Alvarez et al., *Who Should Run Elections in the United States?*, 36 POL'Y STUD. J. 325, 328 (2008); Shaheen Mozaffar & Andreas Schedler, *The Comparative Study of Electoral Governance—Introduction*, 23 INT'L POL. SCI. REV. 5, 16-17 (2002) (identifying democracies that have established “structures of mutual restraint” in which political parties “concur in the appointment of members of the national election commission”).

unprofessional management of the polling place, and partisan control of election administration at the state level—of the U.S. electoral system identified here.<sup>9</sup> To highlight the most telling example of this phenomenon, during the 2000 election controversy in Florida, the elected secretary of state, who was the chief supervisor of the elections in the state, was also the co-chair of the campaign of one of the candidates (George W. Bush).<sup>10</sup> For some reason, the states have had very limited success in creating authentic nonpartisan institutions to oversee the administration of elections.<sup>11</sup> Actual, apparent, or alleged bias has thereby become an expected feature of every critical decision made by states' chief elections officers.<sup>12</sup> This is particularly true when the decisions concern recounts or other exercises of discretion after the votes have been cast and when the likely beneficiaries of such decisions are well-known.<sup>13</sup> Even before the vote, however, decisions concerning voter registration, eligibility, or ballot access will be seen as advancing partisan interests if a partisan official is the decision maker.<sup>14</sup>

## I. CRISIS AND REFORM: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION CONTROVERSY AND ITS AFTERMATH

It often takes a crisis to expose the fragility of a system that under normal circumstances appears stable and relatively problem-free. The 2000 U.S. presidential election presented such a crisis, and it illustrated a number of problems with the American electoral system. For election lawyers, the crisis is often viewed through the lens of the Supreme Court's resolution of *Bush v. Gore*: a controversial decision that focused on the constitutional problems inherent

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9. See Bennett J. Matelson, Note, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1276-77 (1994).

10. Sande, *supra* note 7, at 733.

11. Kimball & Kropf, *supra* note 4, at 1263 (“We find that while public opinion indicates that an elected nonpartisan board of elections is the most preferred local election authority by a national sample of citizens, our data indicate that common practice is not consistent with public opinion.” (internal citation omitted)).

12. See Hasen, *supra* note 1, at 938-42, 958; Sande, *supra* note 7, at 733-38.

13. Richard L. Hasen, *Eight Years After Bush v. Gore, Why Is There Still So Much Election Litigation and What Does This Mean for Voter Confidence in the Electoral Process?*, FINDLAW (Oct. 20, 2008), [http://writ.news.findlaw.com/commentary/20081020\\_hasen.html](http://writ.news.findlaw.com/commentary/20081020_hasen.html).

14. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 191, 203 (2008) (upholding newly-enacted voter identification laws which plaintiffs contended were in part motivated by partisan interests and noting that the rules were supported by all Republicans in the General Assembly and not a single Democrat); Hasen, *supra* note 1, at 945; see also Editorial, *A Step for Voting Reform*, NATION, Jan. 31, 2005, at 4, available at <http://www.thenation.com/doc/20050131/editors2> (calling for election reforms that include “nonpartisan election administration . . . technology that can be examined by people outside the companies providing it and a secure paper trail on all votes cast . . . [and] a nonpartisan national election commission . . . to evaluate the accuracy and representativeness of our election performance regularly and make recommendations for improvement”).

when recounts of paper ballots are not conducted according to uniform standards.<sup>15</sup> But the controversy entailed so much more than its final resolution would suggest, and its lessons for the United States and other countries should not be limited to the headlines created to describe its final resolution.<sup>16</sup> The crisis highlighted the three meta-problems described above—decentralization, partisan administration, and incompetence of varying forms. But it also forced us to think about critical questions of ballot design and technology, voter error, registration problems, absentee ballots, and classic barriers to access.<sup>17</sup>

There are many ways to tell the story of the 2000 election controversy, but few will seem relevant to an international audience seeking lessons that can be universalized for other electoral systems. At its core, the 2000 election revealed that in close contests within the margin of human or mechanical error, all aspects of the system may appear dysfunctional. Beyond that, however, the sheer variety of mishaps exposed the multiple dimensions of an “election ecosystem”<sup>18</sup> that must perform well when the system is under stress. What follow are short descriptions of the individual problems discovered in 2000 and the reforms enacted or discussed in the wake of the controversy. Each situates the American experience in an international context, describing some phenomena and regulations that are unique and others that are more widely shared.

#### *A. Voter Registration*

The United States is unique among democracies in the relative absence of government-initiated action to register voters.<sup>19</sup> The burden of registration falls

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15. See generally Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004) (summarizing legal scholars’ writings on the Supreme Court’s *Bush v. Gore* opinion).

16. See, e.g., Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 976 (2001).

17. Helen Norton, *What Bush v. Gore Means for Elections in the 21st Century*, 2 WYO. L. REV. 419, 420-22 (2002); see also Jo Becker & Dan Keating, *Problems Abound in Election System: Outmoded Machinery Is Still Widespread*, WASH. POST, Sept. 5, 2004, at A1 (highlighting main problems that arose in the 2000 election and explaining how many have still not been resolved); *Bad Ballot Design Results in Staggering Numbers of Lost Votes*, BRENNAN CTR. FOR JUSTICE (July 21, 2008), available at [http://www.brennancenter.org/content/resource/bad\\_ballot\\_design\\_results\\_in\\_staggering\\_numbers\\_of\\_lost\\_votes/](http://www.brennancenter.org/content/resource/bad_ballot_design_results_in_staggering_numbers_of_lost_votes/). The Center reported:

In the most egregious and well-known case, the “butterfly ballot” used in Palm Beach County, Florida during the 2000 presidential election, the presidential race was split into two columns, which . . . likely caused more than 2,000 Democratic voters to mistakenly vote for Pat Buchanan and threw out an additional 20,000 votes due to double-voting—in a race that was decided by fewer than 600 votes.

18. See STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 11-17 (2007).

19. See generally JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 9 (2009), available at

almost exclusively on the voter, although the actual requirements vary from state to state. This allocation of burdens has great consequences for the U.S. population, which is one of the most mobile in the world with more than a quarter of the population moving every two years.<sup>20</sup> Whenever citizens in most states change their address, they must re-register with the local government if they wish to vote in their new community.<sup>21</sup> As a result, demographic characteristics that negatively correlate with mobility (such as age and education) are also powerful predictors of voter turnout.<sup>22</sup> More importantly, the frequent movement of U.S. citizens presents great challenges to maintaining reliable registration lists.<sup>23</sup> Different states have adopted different strategies to “purge” ineligible, deceased, or no longer resident voters from their lists.<sup>24</sup>

The criticism lodged against Florida in 2000 was that the state, in an effort to clear felons from its list of registered voters, purged a number of legitimate voters as well.<sup>25</sup> Although many countries in the world allow prisoners to vote, only two American states do,<sup>26</sup> and some, such as Florida, disenfranchise many felons for extended periods even after they have served their time in prison.<sup>27</sup> The state purged voters with names that matched a list of felons, but that purge list

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[http://www.brennancenter.org/content/resource/expanding\\_democracy\\_voter\\_registration\\_around\\_the\\_world/](http://www.brennancenter.org/content/resource/expanding_democracy_voter_registration_around_the_world/); see also MARTIN P. WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 16 (2002) (“It is frequently said of American voter registration that it places a greater burden on those seeking to vote than do the requirements of any other democracy.”); Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 170 (2001) (“Among modern democracies, U.S. voter registration provisions require a nearly unique degree of individual citizen responsibility, encumbering Americans with greater turnout costs.”).

20. Peverill Squire et al., *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45, 45-46 (1987) (finding that the increased mobility of the U.S. population is directly correlated with low voter turnout rate).

21. WENDY WEISER ET AL., BRENNAN CTR. FOR JUSTICE, VOTER REGISTRATION MODERNIZATION: POLICY SUMMARY 1 (2009), available at [http://brennan.3cdn.net/b75f13413388b2fccc\\_ynm6bn112.pdf](http://brennan.3cdn.net/b75f13413388b2fccc_ynm6bn112.pdf).

22. See *id.* at 5; John A. MacLeod & Merle F. Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93, 95 (1969).

23. See Squire et al., *supra* note 20, at 46.

24. *Id.*; see also WEISER ET AL., *supra* note 21, at 5.

25. Guy Stuart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felons List in the 2000 Elections*, 119 POL. SCI. Q. 453, 469-73 (2004); Gregory Palast, *Florida’s Flawed “Voter-Cleansing” Program*, SALON (Dec. 4, 2000, 10:19 PM), [http://www.salon.com/news/politics/feature/2000/12/04/voter\\_file/](http://www.salon.com/news/politics/feature/2000/12/04/voter_file/).

26. Wilson Ring, *Vermont, Maine Only States to Let Inmates Vote*, BOS. GLOBE (Oct. 22, 2008), [http://www.boston.com/news/local/maine/articles/2008/10/22/vermont\\_maine\\_only\\_states\\_to\\_let\\_inmates\\_vote/](http://www.boston.com/news/local/maine/articles/2008/10/22/vermont_maine_only_states_to_let_inmates_vote/).

27. Erik Eckholm, *States Are Growing More Lenient in Allowing Felons to Vote*, N.Y. TIMES (Oct. 12, 2006), <http://www.nytimes.com/2006/10/12/us/12felons.html> (“[T]hree states, Florida, Kentucky and Virginia, still have lifetime bans on voting by felons.”).

also contained many legitimate voters, which Democrats argued included a disproportionate number of African Americans.<sup>28</sup>

In the wake of the 2000 election, Congress adopted two principal reforms to deal with registration problems. The Help America Vote Act established a system of statewide voter registration lists and provisional balloting.<sup>29</sup> States were required to establish a single authoritative automated list of registered voters that could be publicly scrutinized.<sup>30</sup> Indeed, in this respect, the United States became more like other countries in which such lists are nationally centralized.<sup>31</sup> Because the federal government plays a very small role in voter registration, however, this function was centralized at the state level.<sup>32</sup> While still an oddity as a comparative matter, this was an improvement over the previous system, where such lists may have been kept by county officials.<sup>33</sup>

The second innovation—provisional ballots—was seen as a way of solving the problem of voters incorrectly turned away from the polls.<sup>34</sup> By allowing voters whose registration status was in question to cast provisional paper ballots that were segregated from the normal ballots, the system would leave the question as to whether such ballots should be counted until after the election.<sup>35</sup> Such a system recognizes the difficulty in resolving such controversies in real time in a busy polling place on Election Day. At least with provisional ballots, the threat of actual disenfranchisement (literally preventing an eligible voter from voting) is greatly diminished, even if the likelihood of the vote being counted is less than one hundred percent.<sup>36</sup> However, the more ballots that are deferred for later decision, the more likely that provisional ballots could determine the outcome of

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28. See Stuart, *supra* note 25, at 464; U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <http://www.usccr.gov/pubs/vote2000/report/ch9.htm>.

29. Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

30. *Id.* § 15483(a)(1)(A).

31. See CAL. INST. OF TECH. & MASS. INST. OF TECH., VOTING: WHAT IS, WHAT COULD BE 14-15 (July 2001), available at [http://vote.caltech.edu/drupal/files/report/voting\\_what\\_is\\_what\\_could\\_be.pdf](http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf).

32. 42 U.S.C. § 15483(a)(1)(A) (“[E]ach State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State. . . .”).

33. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 9.

34. 42 U.S.C. § 15482; Daniel Tokaji, *Provisional Voting: Federal Law and Ohio Practice*, in THE E-BOOK ON ELECTION LAW § 5.4 (July 2, 2010), available at [http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures\\_rules01.html](http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules01.html).

35. Wendy R. Weiser, *Are HAVA’s Provisional Ballots Working?*, BRENNAN CTR. FOR JUSTICE 2-3 (Mar. 29, 2006), [http://www.brennancenter.org/page/-/d/download\\_file\\_39043.pdf](http://www.brennancenter.org/page/-/d/download_file_39043.pdf).

36. *Id.* at 2.

a close election, and therefore, that litigation would result to contest the legitimacy of such ballots. Moreover, since 2000, states and localities have enforced inconsistent standards as to which provisional ballots will be counted.<sup>37</sup>

In subsequent elections, however, new problems with the voter registration system have emerged to become the chief challenges for election reformers in the United States. In particular, private organizations that have filled the void caused by the government's absence in registering voters have come under scrutiny for registering fictitious or duplicate persons.<sup>38</sup> At the same time, state parties have also developed strategies for challenging the status of voters—for example, by comparing the voter registration list to other lists such as driver's license, Social Security, change of address, or home foreclosure lists—to question the residency of voters.<sup>39</sup> If Congress revisits election reform during the Obama presidency, it will likely grapple with both the activities of outside groups that register voters and the permitted reasons for challenging voters. If the United States were to move toward the international consensus position on voter registration, which is to have greater government involvement in registering voters, many such problems would be solved.<sup>40</sup> However, the United States is unique among nations in that the government does not keep a list of citizens, nor does it provide all citizens with identification that demonstrates citizenship. That failure hampers the government's ability to develop lists of eligible citizens for other purposes, such as voting.<sup>41</sup>

### B. Ballot Technology

The 2000 election controversy is defined in the popular imagination by images of cross-eyed vote counters examining holes punched on paper cards. The recount brought into stark view the nineteenth century technology that was being used to run modern U.S. elections. Reforms in the wake of the 2000 election led to the elimination of punch-card ballots and significant federal subsidies for new technology, such as Direct Recording Electronic (DRE) voting machines.<sup>42</sup> Many

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37. See PEW CTR. ON THE STATES, SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004, at 7-8 (Apr. 2005), available at <http://www.pewcenteronthestates.org/uploadedFiles/ERIP10Apr05.pdf>; Weiser, *supra* note 35, at 5.

38. Mike Pesca, *Politicizing the Process of Registering Voters*, NAT'L PUB. RADIO (Oct. 19, 2004), <http://www.npr.org/templates/story/story.php?storyId=4116462&ps=rs>; Steve Friess, *Acorn Charged in Voter Registration Fraud Case in Nevada*, N.Y. TIMES, May 5, 2009, at A18, available at <http://www.nytimes.com/2009/05/05/us/05acorn.html>.

39. Christopher Cooper & Evan Perez, *Voting-Rights Conflicts Intensify*, WALL ST. J., Sept. 17, 2008, at A22, available at [http://online.wsj.com/article/SB122161670293146325.html#articleTabs\\_interactive](http://online.wsj.com/article/SB122161670293146325.html#articleTabs_interactive); Michael Moss, *Big G.O.P. Bid to Challenge Voters at Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, available at <http://www.nytimes.com/2004/10/23/politics/campaign/23vote.html>.

40. See ROSENBERG & CHEN, *supra* note 19, at 26.

41. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 9-11.

42. Ron Word, *Florida Rids Itself of Punch-Card Ballots*, A.P. ONLINE (Sept. 5, 2001),

procurement decisions made in the wake of the 2000 controversy were later a source of regret as a lack of confidence in the security of electronic machines led many states to abandon them.<sup>43</sup>

Ballot technology and error rates constituted the most studied phenomena in the wake of the 2000 controversy. The Caltech/MIT Voting Technology Project (“the Project”) examined the error rates of different voting methods and concluded that punch-card ballots were far inferior to other technologies, such as optical scan ballots or electronic voting machines.<sup>44</sup> However, the Project also found that the quality of election administration was a more important factor in the number of lost votes (votes that end up not being counted) than the technology used by voters to cast their ballot.<sup>45</sup> In other words, from the standpoint of reliability in translating voter intentions to counted ballots, it was better to have better administration with inferior technology than superior technology with poor administration. Indeed, that lesson is one that reformers both within and beyond the United States should take to heart.

With respect to ballot technology, however, many jurisdictions that switched quickly to electronic voting machines came to regret that decision. Concerns about security and reliability of certain machines led some to abandon them.<sup>46</sup> Fear of hackers, as well as reports of breakdowns, led other jurisdictions to rely on technological advances that had paper backups in the event of a recount.<sup>47</sup> In particular, experience since 2000 has led many to conclude that one of the critical features of reliable balloting technology is guaranteeing a voter’s ability to verify that the ballot accurately reflects his or her intentions. So-called precinct-based

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<http://www.highbeam.com/doc/1P1-46675150.html>; see Daniel Tokaji, *Voting Technology*, in THE E-BOOK ON ELECTION LAW § 4.1, available at [http://mortizlaw.osu.edu/electionlawbook/part4/equipment\\_machines06.html](http://mortizlaw.osu.edu/electionlawbook/part4/equipment_machines06.html) (last visited Nov. 18, 2010); Hasen, *supra* note 1, at 950-51.

43. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 25-26; John Ingold, *Colorado Set to Abandon Electronic Voting: How Will Colorado Vote?*, DENVER POST (Jan. 16, 2008, 8:44 AM MST), [http://www.denverpost.com/breakingnews/ci\\_7981616](http://www.denverpost.com/breakingnews/ci_7981616); Pam Fessler, *Several States Abandon Electronic Voting for Paper*, NAT’L PUB. RADIO (Jan. 25, 2008), <http://www.npr.org/templates/story/story.php?storyId=18399431>.

44. HENRY E. BRADY ET AL., UNIV. OF CAL., BERKELEY, COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 32 (2001), <http://www.sos.wa.gov/documentvault/UniversityofCaliforniaBerkeleyCountingAlltheVotesSeptember2001-1020.pdf>; R. Michael Alvarez et al., A Preliminary Assessment of the Reliability of Existing Voting Equipment 12-13 (Feb. 1, 2001) (unpublished manuscript), available at <http://e-voto.di.fc.ul.pt/docs/A%20Preliminary%20Assessment%20of%20the%20Reliability%20of.pdf>.

45. See CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 8-9 (finding that of the four to six million votes lost in the 2000 election, 1.5 to two million were lost because of faulty equipment and confusing ballots, while the rest were lost because of registration mix-ups, poorly conducted polling place operations, and absentee ballot problems).

46. Fessler, *supra* note 43.

47. Stephanie Desmon & Stephen Kiehl, *Security of Ballot Not 100%: Critics Expect Flaws as Maryland Switches Systems*, BALT. SUN (Jan. 19, 2008), [http://articles.baltimoresun.com/2008-01-19/news/0801190221\\_1\\_paper-ballots-voting-machines-optical-scan-machines](http://articles.baltimoresun.com/2008-01-19/news/0801190221_1_paper-ballots-voting-machines-optical-scan-machines).

optical scan technology allows a voter to place a paper optical scan ballot into a machine, which will reject it if the ballot is unreadable for some reason, such as an accidental vote for more than one candidate.<sup>48</sup> Electronic voting machines will prevent a voter from double voting in an election and will often require voters to verify that they intend to undervote if they intentionally leave one of the offices blank.<sup>49</sup>

In addition to highlighting problems with the technology itself, the 2000 election brought to the fore the importance of ballot design in preventing voter error. Although many remember the 2000 election as turning on punch-card ballots, it was the defective Palm Beach butterfly ballot that received the most attention in the days following the election.<sup>50</sup> Because of the placement of names on that ballot, thousands of voters who believed they were voting for Al Gore ended up voting for Reform Party candidate Patrick Buchanan.<sup>51</sup> Also, as later analysis of the ballots revealed, another design error in Duval County led voters inadvertently both to vote for Al Gore and to write his name as a write-in candidate, subsequently leading to thousands of disqualified votes.<sup>52</sup>

No technology is exempt from potential errors in ballot design, although allowing voters to verify their vote will reduce the impact of such errors. We have learned in subsequent elections that even electronic voting machines can lead voters to miscast their votes based on misunderstandings concerning, for example, which candidates are running for which offices.<sup>53</sup> These design

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48. Tigran Antonyan et al., *State-Wide Elections, Optical Scan Voting Systems, and the Pursuit of Integrity*, 4 IEEE TRANSACTIONS ON INFO. FORENSICS & SEC. 597, 597 (2009).

49. *Id.*

50. STAFF OF H. COMM. ON THE JUDICIARY, 107TH CONG., HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION 38 (Comm. Print 2001); John-Thor Dahlburg, *Designer of Florida's Butterfly Ballot Loses Job; She Was Blamed for Confusion in 2000 Presidential Election*, L.A. TIMES (Sept. 2, 2004, 4:00 PM PST), [http://articles.sfgate.com/2004-09-02/news/17442939\\_1\\_butterfly-ballot-howard-dean-conservative-reform-party-candidate](http://articles.sfgate.com/2004-09-02/news/17442939_1_butterfly-ballot-howard-dean-conservative-reform-party-candidate).

51. Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 793 (2001) (finding that the butterfly ballot caused over 2000 Democratic voters to mistakenly vote for Buchanan instead of Gore); *Newspaper: Butterfly Ballot Cost Gore White House*, CNN (Mar. 11, 2001, 8:43 AM), <http://edition.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount/index.html?iref=storysearch>.

52. See Alan Agresti & Brett Presnell, *Misvotes, Undervotes and Overvotes: The 2000 Presidential Election in Florida*, 17 STAT. SCI. 436, 438 (noting that “more than 20% of the ballots in predominantly African-American precincts in Duval County were tossed out”); see generally Kirk Wolter et al., *Reliability of the Uncertified Ballots in the 2000 Presidential Election in Florida*, 57 AM. STATISTICIAN 1 (2003), available at <http://www.amstat.org/misc/presidentialelectionballots.pdf> (discussing a study that conducted a comprehensive review of all uncounted ballots in Florida and found that had the recount been limited to the counties Gore contested, Bush still would have won the election).

53. Clive Thompson, *Can You Count on Voting Machines?*, N.Y. TIMES (Jan. 6, 2008), <http://www.nytimes.com/2008/01/06/magazine/06Vote-t.html>.

problems, as well as the technology problems noted above, are more pronounced in the United States given the large number of offices and propositions appearing on ballots.<sup>54</sup> In many countries, voters vote for one or two offices in a given election, often on long ballots that simply list parties participating in that election. In the United States, it is not uncommon for voters to vote for three federal offices, five state offices, multiple local offices, judges, and referenda on the same ballot.

### C. Modes of Voting

In addition to problems with the balloting on Election Day itself, the 2000 election included controversies concerning the counting of absentee ballots, particularly ballots cast by soldiers overseas.<sup>55</sup> As each ballot was scrutinized in the litigation following the vote, the technical requirements for absentee ballots became a fertile source of disagreement as to which ballots were legally cast and as to how much help administrators should provide voters who made technical errors.<sup>56</sup> That lesser-known aspect of the controversy presaged the recent controversy in the U.S. Senate race in Minnesota in which as many as five percent of absentee ballots were rejected as invalid.<sup>57</sup>

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54. See LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, BETTER BALLOTS 18-59 (July 2008), available at [http://brennan.3cdn.net/d6bd3c56be0d0cc861\\_hlm6i92vl.pdf](http://brennan.3cdn.net/d6bd3c56be0d0cc861_hlm6i92vl.pdf) (summarizing problems with ballot design in the United States).

55. Kosuke Imai & Gary King, *Did Illegal Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?*, 2 PERSP. ON POL. 537, 537-49 (2004) (arguing that although Al Gore received more votes than George W. Bush in Florida, Bush won the election due to overseas absentee ballots that came in and were counted after election day); David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, available at <http://www.nytimes.com/2001/07/15/national/15BALL.html>. Barstow and Van Natta noted that

[i]n an analysis of the [2490] ballots from Americans living abroad that were counted as legal votes after Election Day, The Times found 680 questionable votes. Although it is not known for whom the flawed ballots were cast, four out of five were accepted in countries carried by Mr. Bush, The Times found. Mr. Bush's final margin in the official total was 537 votes.

56. See *Gore on the Defensive*, SALON (Nov. 19, 2000, 1:07 PM), [http://www.salon.com/news/politics/trail/2000/11/19/trail\\_mix/index.html](http://www.salon.com/news/politics/trail/2000/11/19/trail_mix/index.html) (explaining how the GOP had alleged that the Democratic Party was engaged in a campaign to disqualify 1420 overseas ballots based on technicalities); Richard L. Berke, *Examining the Vote; Lieberman Put Democrats in Retreat on Military Vote*, N.Y. TIMES, (July 15, 2001), <http://www.nytimes.com/2001/07/15/us/examining-the-vote-lieberman-put-democrats-in-retreat-on-military-vote.html?sec=&spon=&pagewanted=all>; Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES (Sept. 13, 2004), <http://www.nytimes.com/2004/09/13/politics/campaign/13vote.html>.

57. *Courts May Decide Minn. Senate Seat*, USA TODAY (Nov. 28, 2008, 4:04 AM), [http://www.usatoday.com/news/politics/election2008/2008-11-28-minnesota-senate-race\\_N.htm](http://www.usatoday.com/news/politics/election2008/2008-11-28-minnesota-senate-race_N.htm) (“Secretary of State Mark Ritchie estimated that 12,000 absentee ballots were rejected for various

The rising trend in absentee and early voting threatens to revolutionize the way the United States manages its elections.<sup>58</sup> In some respects, these alternative modes of voting have brought the United States closer to the majority of nations that allow for voting on more than one day. Historically, most voters in the United States, unless they had a compelling reason for nonattendance at the polls, could only vote on the Tuesday (not a national holiday as in many other countries) when elections were conducted.<sup>59</sup> In the modern era, with the rise of absentee and early voting, elections in some states now begin several weeks before the official date.<sup>60</sup> Many states have moved toward these innovations in order to mitigate the frenzy and long lines that can accompany a single election day.<sup>61</sup>

Just as voters on Election Day cast ballots by many methods, so too do early voters. In the western states, early voters disproportionately vote by absentee ballot; they mail in their request for a ballot and then return the ballot by mail before Election Day.<sup>62</sup> Such is the case for overseas and military voters, as provided by federal law.<sup>63</sup> Some states will allow absentee ballots to be faxed or emailed as well. In other states, polls open days or weeks in advance so voters have an extended period by which to cast their ballot, or the state opens a limited number of vote centers in advance of Election Day.<sup>64</sup> Looming on the horizon, of course, is Internet voting. The United States recently has experimented with some overseas military voters voting on-line, but the limited success of that effort has yet to assuage those concerned about the method's security.<sup>65</sup>

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reasons. That's between 4% and 5% of all the absentee ballots cast.”).

58. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 512 (2003) (“The rise in absentee voting, the ease of obtaining absentee ballots, and the role of the parties in the process could easily lead to increased fraud and the loss of protections of the secret ballot.”).

59. David S. Broder, *Why Vote on Tuesdays?*, WASH. POST (Nov. 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110901650.html>; Jesse McKinley, *A Push to Supplement Tuesday Voting with Weekends*, N.Y. TIMES, Mar. 10, 2010, at A18, available at <http://www.nytimes.com/2010/03/10/us/10vote.html>.

60. Mary Fitzgerald, *Greater Convenience but Not Greater Turnout: The Impact of Alternative Voting Methods on Electoral Participation in the United States*, 33 AM. POL. RES. 842, 846-48 (2005); see also CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 33 (“While only [eight] percent of ballots were cast before Election Day in 1994, by 2004 the percentage of ballots cast before Election Day had risen to [twenty-two] percent.”).

61. See Fitzgerald, *supra* note 60, at 846-49.

62. Paul Gronke et al., *Early Voting and Turnout*, 4 POL. SCI. & POL. 639, 639-40 (2007); Scott Helman, *Minds Made Up, Millions Voting Early*, Bos. GLOBE (Sept. 30, 2008), [http://www.boston.com/news/nation/articles/2008/09/30/minds\\_made\\_up\\_millions\\_voting\\_early/](http://www.boston.com/news/nation/articles/2008/09/30/minds_made_up_millions_voting_early/) (“Interest in early and absentee voting has grown since the 1970s, especially in Western states, which have been the pioneers, researchers say.”).

63. 42 U.S.C. § 1973ff-2 (2006).

64. See Gronke et al., *supra* note 62, at 639-41.

65. R. MICHAEL ALVAREZ & THAD E. HALL, *POINT, CLICK, & VOTE: THE FUTURE OF*

These alternative methods of voting have raised a new set of concerns that should caution other countries moving in a similar direction. Some worry that early voters do not have the benefit of basing their decisions on late-breaking developments in a campaign.<sup>66</sup> The more serious problem, as noted above, concerns the error rates on absentee ballots, which sometimes lead to a great number of uncounted votes.<sup>67</sup> This high rate of spoilage results from the failure of voters to comply with the technical requirements of requesting and submitting such ballots, as well as errors in actually casting their vote.<sup>68</sup> Without the aid and supervision of election officials, ballots cast in private (as absentee ballots are) are ripe for both fraud and error.<sup>69</sup>

In-person early voting poses a separate set of challenges, principally for the candidates and parties wishing to have observers in the polling place throughout the early voting period. When elections were held on a single day, staffing polling places with representatives from the campaigns was easy. Placing people there for two weeks when they are most needed for the final days of campaigning presents administrative challenges that political operatives have only just begun to confront. Nevertheless, given their popularity, these forms of “convenience” voting are here to stay and will only gain greater acceptance.<sup>70</sup> Whether the states begin to move toward the next stage (Internet voting) depends on whether both insiders and the public become convinced of its reliability and security.

#### *D. Counting and Recounting Votes*

In the end, the 2000 presidential election controversy was about the fairness of standards used to count ballots. The U.S. Supreme Court found that the recount process ordered by the state court in Florida treated similar ballots differently, such that voters in parts of the state with more permissive standards would be more likely to have their votes counted than those in other parts of the state.<sup>71</sup> The unbounded discretion left in the hands of those counting the votes could lead to impermissible discrimination based simply on the fortuity of which

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INTERNET VOTING 1-8 (2004); Alan Boyle, *Pentagon Launches Internet Voting Effort for Overseas Americans*, MSNBC (June 3, 2003), <http://www.msnbc.msn.com/id/3078931/>; CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 14-15; John Dunbar, *Internet Voting Project Cost Pentagon \$73,809 Per Vote*, THE CTR. FOR PUBLIC INTEGRITY (Aug. 9, 2001), <http://projects.publicintegrity.org/telecom/report.aspx?aid=297>.

66. JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 61 (2006); Steve Kornaki, *The Big Problem with Early Voting*, N.Y. OBSERVER (Feb. 12, 2008, 3:47 PM), <http://www.observer.com/2008/big-problem-early-voting>.

67. See *Courts May Decide Minn. Senate Seat*, *supra* note 57.

68. See CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 38.

69. See Fortier & Ornstein, *supra* note 58, at 512-13.

70. See Fitzgerald, *supra* note 60, at 847-48 (finding that fifteen states had implemented in-person early voting between 1970 and 2002); Gronke et al., *supra* note 62, at 640 (“Election officials are strong advocates of early voting reforms.”).

71. Bush v. Gore, 531 U.S. 98, 105-07 (2000).

vote counter may have counted which ballot.<sup>72</sup>

Although the Supreme Court's opinion spoke the language of discrimination and equal protection, underlying it was a concern about partisan administration and incomplete legal regimes.<sup>73</sup> Some number of similarly situated ballots will always be treated differently in any election where millions of votes must be tabulated. Random error, which is inevitable, would not raise constitutional concerns.<sup>74</sup> Bias, or the potential for bias, triggers more fundamental concerns (well known within and beyond the United States) about use of the power to count votes to determine election outcomes.

The potential for political favoritism grows when the legal regime is not designed for the task of recounting ballots in a close election. Such was the case in Florida in 2000. Gaps in the statute needed to be filled either by state officials or the courts, with charges of bias being lodged depending on the suspected party affiliation of the decision maker. The U.S. Supreme Court was not immune to such charges either, but public opinion polling in the year after the Court's resolution of the controversy showed that it had not suffered any long-term damage to its credibility among the mass public.<sup>75</sup>

In these respects, the 2000 presidential election controversy looked like most election controversies in other parts of the world. Although ballot box stuffing and classic forms of fraud may be more pronounced elsewhere, these controversies ultimately follow a script of insiders using their power to tilt election outcomes in their favor. As in other countries, the actual and perceived independence of those overseeing the counting of votes is critical to accord legitimacy to the process.<sup>76</sup> As detailed in the introduction, the United States has proven uniquely incapable of developing nonpartisan institutions to oversee its democracy.<sup>77</sup> Not only the chief election officials of states, but even our judges are either elected or appointed by partisans.<sup>78</sup> In stark contrast, most countries

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72. *Id.*

73. See *id.* at 128 (Stevens, J., dissenting) ("What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit."); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 77, 91-92 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (arguing that the Supreme Court's decision in *Bush v. Gore* was based on an underlying mistrust of all other actors in the political process).

74. Karlan, *supra* note 73, at 91-92.

75. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 112 (2002).

76. See generally CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 49.

77. See *supra* notes 1-14 and accompanying text.

78. Hasen, *supra* note 1, at 974 ("In thirty-three states, the secretary of state (or other statewide official charged with responsibilities as the Chief Elections Officer of the state (CELO)) is elected through a partisan election process. No state currently elects the CELO through a

have found ways to insulate bureaucrats and election judges from the normal partisan pressures of the electoral environment.<sup>79</sup> To be sure, losers in any contested process often feel unfairly treated, no matter how cordoned-off the decisionmakers may be.<sup>80</sup>

## II. GOALS FOR AN ELECTION REFORM AGENDA

The recent U.S. experience with crisis and reform teaches lessons that, to some extent, can be universalized for other countries. Of course, every electoral system is different, and the cultural, economic, and institutional context will greatly affect the goals and capabilities of reform. Nevertheless, each electoral system seeks to further common values, even if they necessarily must strike the balance in different ways.

As a threshold matter, an electoral system must accurately capture the preferences of those who cast ballots.<sup>81</sup> Perfect accuracy can never be achieved, and resources spent to ensure an accurate result are often traded off against those necessary to further other values, such as participation, competition, and representation. Reformers must recognize that no perfect electoral system exists and that the best technology with the finest administrators operating under the best set of rules will not produce results that perfectly translate voter intentions into counted ballots. Although perfection may be illusory, minimizing errors to the extent possible given other pressing values remains the defining feature of a working election system.

This concern with accuracy might also be seen as a value implicit to representativeness—that is, the election results must accurately represent the preferences of those who cast votes. This does not necessarily imply that all votes must be counted, but rather that any errors in vote tabulation should be random and not biased against identifiable subgroups of the population. Different electoral systems attempt to achieve representativeness in different ways—for example, by choosing between proportional and plurality-based systems. Indeed, in the United States, the Electoral College system has made it possible for a candidate to win the presidency, as George W. Bush did,<sup>82</sup> while receiving fewer

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nonpartisan election. The remaining states use an appointments process.”); David G. Savage, *Elected Judges Make a Case for ‘Appearance of Bias’*, CHI. TRIB. (Feb. 22, 2009), [http://articles.chicagotribune.com/2009-02-22/news/0902210111\\_1\\_recusal-justices-judges](http://articles.chicagotribune.com/2009-02-22/news/0902210111_1_recusal-justices-judges) (“In [thirty-eight] states, some judges are elected. Nineteen states besides West Virginia and Illinois elect the justices of their supreme court.”).

79. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 5.

80. *Id.* at 49 (“The losing side, not surprisingly, is unhappy with the election result, but what is new and dangerous in the United States is that the supporters of the losing side are beginning to believe that the process is unfair.”).

81. See *id.* at 1.

82. R. Michael Alvarez, *Measuring Election Performance* 1 (Caltech/MIT Voting Tech. Project, Working Paper No. 94, 2009), available at [http://vote.caltech.edu/drupal/files/working\\_paper/wp\\_94\\_pdf\\_4b676033ef.pdf](http://vote.caltech.edu/drupal/files/working_paper/wp_94_pdf_4b676033ef.pdf) (noting that although Gore received approximately 550,000

votes than his opponent.<sup>83</sup> At a minimum, though, when it comes to electoral administration, representativeness requires that decisions made by administrators should not skew outcomes and that avoidance of bias in the inevitable inaccuracies exist as a paramount goal.

Beyond counting votes accurately and fairly, a well-functioning electoral system must allow for widespread participation. Gone are the days when limiting the vote to white, male property owners, for example, could qualify a country as a robust democracy. Even among those that putatively accord universal suffrage, countries continue to disenfranchise whole groups of adult citizens based on their status (such as prisoners,<sup>84</sup> ex-prisoners, the mentally incompetent,<sup>85</sup> or recent residents<sup>86</sup>), and most limit the vote to adult resident citizens. Contemporary debates focus more on the barriers to participation through identification, registration, and other requirements.

Especially in the United States, the value of participation appears in tension with values of electoral integrity and accuracy. In particular, many argue that lowering the barriers to participation represents an invitation for voter fraud.<sup>87</sup> Such is the criticism made by those favoring a move (quite common throughout

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more votes than Bush, Bush won the 2000 presidential election).

83. See generally John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968) (critiquing the inequality in voting power inherent in the Electoral College system). But see NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 23 (2001), available at <http://election2000.stanford.edu/full.report.8.2001.pdf> (acknowledging the traditional critiques of the electoral college but reminding citizens that the electoral college “was a delicate compromise that solved one of the most difficult problems of the Constitutional Convention”).

84. See generally Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL'Y 235 (2005). For an overview of international prisoner disenfranchisement laws, see generally CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

85. Forty-four American states disenfranchise some individuals with cognitive and emotional impairments. Kay Schriner & Lisa A. Ochs, *Making Exceptions to Universal Suffrage: Disability and the Right to Vote*, in ENCYCLOPEDIA OF CRIMINOLOGY AND DEVIANT BEHAVIOR 179, 179 (Charles E. Faupel & Paul M. Roman eds., 2000).

86. See ROSENBERG & CHEN, *supra* note 19, at 16 n.62 (noting that while a number of other countries have used data-sharing arrangements among government agencies to ensure that eligible voters can vote even if their personal information has changed, the United States has used such techniques to identify citizens who may be ineligible to vote locally).

87. Crawford v. Marion Cnty. Election Bd., 533 U.S. 181, 191-93 (2008) (supporting the legitimacy of the state interest in preventing in-person voter fraud, despite the lack of evidence suggesting it is an issue); Purcell v. Gonzales, 549 U.S. 1, 4 (2006) (“Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”); Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1738 (2008) (concluding that “perceptions of fraud have no relationship to an individual’s likelihood of turning out to vote”).

the world where governments provide their citizenry with identification or citizenship papers) to require photo identification in order to vote.<sup>88</sup> A similar criticism is often raised against different forms of convenience voting, such as absentee ballots,<sup>89</sup> which have been the most amenable to manipulation and fraud by political entrepreneurs.<sup>90</sup> On the one hand, the opportunity to vote at home, in private, at a convenient time ensures that some voters will end up voting who otherwise would not (although the empirical evidence suggests that such measures do not appreciably increase turnout).<sup>91</sup> On the other hand, removing such hurdles presents enforcement challenges to ensure that these votes are cast by the voters themselves and are not cast under duress or for reward.<sup>92</sup>

Of course, participation as a value extends beyond voters to candidates and parties, and it is thereby often reinterpreted as “competitiveness.”<sup>93</sup> Like representativeness, competitiveness is a value open to radically different interpretations. It could imply mere contestation, as reflected in the sheer number of candidates or parties that appear on the ballot.<sup>94</sup> It could also entail genuine rivalry, as in the number of candidates or parties with a realistic chance of winning control.<sup>95</sup> Alternatively, it could be assessed according to the results of elections, such as the margins of victory.<sup>96</sup> Competition, however we define it,

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88. CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 18 (“There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.” (footnote omitted)).

89. For a discussion on the impact of the vote-by-mail system implemented in Oregon, see generally Priscilla L. Southwell & Justin Burchett, *Vote-by-Mail in the State of Oregon*, 34 WILLAMETTE L. REV. 345 (1998).

90. See Fortier & Ornstein, *supra* note 58, at 512-13 (detailing the theoretical problems with absentee ballots and noting actual instances of absentee ballot fraud).

91. Fitzgerald, *supra* note 60, at 856 (noting that a study spanning thirty years, all fifty states, and presidential and congressional elections found that early voting procedures, such as unrestricted absentee ballots, do not increase voter turnout.); see also Gronke et al., *supra* note 62, at 644 (“There may be good reasons to adopt early voting—more accurate ballot counting, reduced administrative costs and headaches, and increased voter satisfaction—but boosting turnout is not one of them.”).

92. Fortier & Ornstein, *supra* note 58, at 512-13.

93. See generally THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS (Michael P. McDonald & John Samples eds., 2006) (examining why electoral competition in the United States is in decline and hypothesizing about what might be done to increase competition).

94. Nathaniel Persily, *The Place of Competition in American Election Law*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 171, 172 (Michael P. McDonald & John Samples eds., 2006).

95. *Id.* at 173.

96. *Id.*

may be an indispensable element of democracy, even though close elections place great stress on almost any electoral system. The 2000 presidential election controversy in the United States, like the one in Mexico six years later,<sup>97</sup> must be a relatively rare event if the system is to withstand the inevitable allegations of malfeasance that accompany any razor-thin victory.<sup>98</sup>

This discussion leads to the final value reform should further: preserving public confidence in the electoral system. Public confidence and trust in the system, while foundational to accord legitimacy to the government, turns out to be very difficult to achieve in some deliberate way.<sup>99</sup> Of course, at the margins, a system that is completely non-transparent and seems to produce repeated results that fly in the face of what majority preferences would seem to predict will be crippled by a lack of confidence. Beyond the obvious cases of faux democracies, however, few agreed-upon strategies exist to maintain public confidence when the system is under stress. This is not to say that all countries have populations with equal degrees of skepticism of their political system. Rather, the predictors of the levels of mistrust vary greatly based on cultural<sup>100</sup> and institutional contexts<sup>101</sup> and the nature of political cleavages in the democracy. Confidence in the electoral system will often vary with confidence in government and public structures more generally,<sup>102</sup> and election administration and law can only do so much to address those larger concerns.

Losers in close elections will often challenge the validity of the process that

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97. Manuel Roig-Franzia, *Contender Alleges Mexico Vote Was Rigged*, WASH. POST, July 9, 2006, at A1.

98. NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 83, at 17 (noting that in 1996, three-quarters of the population felt that the electoral process was fair, which then dropped to one-half after the 2000 election).

99. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, HOW AMERICANS VIEW GOVERNMENT: DECONSTRUCTING DISTRUST (Mar. 10, 1998), available at <http://peoplepress.org/report/95/> (noting that Americans' distrust of government tends to remain relatively constant throughout the decades, with slight vacillations due to political scandals and economic downturns); see generally WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye et al. eds, 1997) (analyzing likely causes of declining public confidence). In fact, public trust in government and political institutions has declined in all industrialized democracies since the 1990s, although in varied patterns and levels. See PERI K. BLIND, BUILDING TRUST IN GOVERNMENT IN THE TWENTY-FIRST CENTURY: REVIEW OF LITERATURE AND EMERGING ISSUES 8 (Nov. 2006), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025062.pdf>.

100. Blind, *supra* note 99, at 8 (finding that the decrease in public trust in government was blamed on a variety of reasons, such as continuing tensions on nationalism and separatism in Canada and the strains of unification in Germany).

101. *Id.* at 7 (finding that, for example, civic engagement and political trust are positively correlated in the industrialized world, but in developing countries like the Dominican Republic and Morocco, civic engagement actually decreases trust, as it exposes citizens to the corrupt and illegitimate daily practices of government).

102. *Id.* at 11-12, 20 (concluding that economic challenges and political scandal appear to be two major contributors to the declining trust in government).

determined the victor. Whether valid or not, supporters of the loser will express a lack of confidence in the process.<sup>103</sup> The critical question is whether those feelings of mistrust subside over time or produce widespread apathy or organized violence.<sup>104</sup> This will depend in part on whether the institutions overseeing elections have built up a repository of goodwill that allows them to survive the stress of close elections.<sup>105</sup> To be sure, a record of nonpartisanship and institutional buffers against political pressures may help, just as would inclusion of all potentially critical parties in decision making processes and institutional design in the pre-election period. Even the most cautionary, well-meaning designers of institutions, however, should not overestimate their ability to prevent the inevitable loss of confidence among sore losers in a close election.<sup>106</sup> Rather than worry about perceptions of fairness and accuracy, reformers would do well to focus on actually making the process fair and accurate with the hope that the public will recognize it as such.

### III. METRICS FOR SUCCESS

Listing the values that an election administration system ought to achieve, even while recognizing that they are in tension, is easier than providing agreed-upon metrics to evaluate the fulfillment of such goals. What follow in this subsection are potential metrics that different democracies have employed to measure fulfillment of those goals. As with the values themselves, it may be impossible to maximize along all metrics simultaneously, and basic features of the political or electoral system may make achievement more difficult in some contexts. That said, these metrics can often be adjusted to accommodate local institutional capabilities and political realities.

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103. After the 2000 presidential election, three-quarters of Democrats doubted the fairness of the process. NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 83, at 17.

104. See, e.g., Allan J. Cigler & Russell Getter, *Conflict Reduction in the Post-Election Period: A Test of the Depolarization Thesis*, 30 W. POL. Q. 363, 363-64 (1977) (finding that with one exception, polarization in the United States has not led to violent resistance to a regime); Steve Inskeep & Gwen Thompkins, *Kenya's Post-Election Violence Kills Hundreds*, NAT'L PUB. RADIO (Jan. 2, 2008), <http://www.npr.org/templates/story/story.php?storyId=17774507> (reporting on the violence that surrounded the 2008 presidential election in Kenya).

105. Cigler & Getter, *supra* note 104, at 363 ("Continued citizen support in the post-election period depends on the widespread belief that the electoral contest has been resolved legitimately and that the mantle of authority has been conferred upon the regime in a manner deserving of respect and support for the collective decision.").

106. One author notes that the cognitive dissonance resulting from the preferred candidate's loss (i.e., "my candidate is the best candidate" versus "my candidate lost") may be psychologically dealt with by denying that the preferred candidate actually lost at all, thus resulting in greater polarization of political sentiments after the election (e.g., "the other candidate only won because of voter fraud"). *Id.* at 366-67.

### A. Lost Votes

In the wake of the 2000 U.S. presidential election controversy, the Caltech/MIT Voting Technology Project (“the Project”) developed a measure of lost votes to calculate the total number of voters whose votes were not counted or were otherwise prevented from voting.<sup>107</sup> The measure identifies the number of ballots cast that were not counted plus the number of voters who were prevented from voting due to problems with their registration.<sup>108</sup> The Project estimated that according to this measure, four to six million votes were lost in the 2000 presidential election.<sup>109</sup>

Calculating the number of lost votes requires good data on the number of voters who attempt to vote, the number of ballots that are cast, and the number that are counted. These constitute basic pieces of information that any election system ought to maintain, but they require some kind of uniform, centralized clearinghouse for the information.<sup>110</sup> Moreover, to record voter intentions and the reasons for failing to vote may require comprehensive surveys in the wake of an election.<sup>111</sup> Official totals can only calculate the pieces of paper—whether actual votes or names on a turnout tally—that were in fact delivered. For those who failed to participate in the system, surveys may be the only way to assess their number and reasons for nonparticipation.

For the most part, the number or share of votes that are lost provides a gauge for assessing the failure of the electoral regime to translate voter intentions into actual votes. The measure does not distinguish intentional fraud from unintentional malfunction. Votes could go uncounted either because the machines do not register a vote<sup>112</sup> or because vote counters do not count them.<sup>113</sup>

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107. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 8.

108. *Id.* (finding that 7.4% of the forty million registered voters who did not vote listed registration problems as the cause).

109. *Id.*

110. The Voting Technology Project recommends that the federal government fund an independent agency for election administration that “would perform the sort of information clearinghouse function that it would see as necessary in order to establish best practices and to improve the information that counties have when they purchase equipment.” *Id.* at 54.

111. For many years, the only data source for studies on voter registration problems was the U.S. Census Bureau’s Current Population Survey Voting Supplement, which asked eligible citizens if they voted, and if they did not vote, if they were registered. Alvarez, *supra* note 82, at 4. If a voter was registered but did not vote, he was then given the opportunity to choose one reason from a list of reasons for not voting. *Id.* Recently, however, a Voting Technology Project research team developed the first major survey-based research effort to study voter experience and election performance. *Id.* at 5-6. According to the researchers, this survey allows for a much more nuanced examination of voter problems, including the types of problems faced as well as where those problems are occurring and the magnitude of the problems. *Id.* at 4-7.

112. For example, in the 2000 election, 678 votes were not counted in New Mexico’s Rio Arriba County, and the state had the narrowest winning margin of only 366 votes. Despite the fact that voters utilized state-of-the-art push-button electronic voting machines, it appears that a

Similarly, problems with the registration system could reflect either negligence or intentional efforts to register some voters and not others. The potential recommended policy changes will depend on the cause of the lost votes.<sup>114</sup> They could range from a change in balloting or registration technology to better training of election workers.<sup>115</sup> If intentional malfeasance is the suspected cause of lost votes, then it may be appropriate to recommend measures to increase transparency and bring multiple stakeholders into the process of administration and vote counting.<sup>116</sup>

### B. Turnout

Voter turnout may be the election phenomenon political scientists have studied most intensely, and it may be the metric most easily measured to gauge a democracy's health. Although many questions still remain (such as why voter turnout seems to have declined across the world over the last generation<sup>117</sup>), many of the causes and correlates for high voter turnout are well-known. At the same time, methodological controversies often exist in how to measure voter turnout. The number of voters is often well-known from official statistics, but assessing the appropriate denominator to measure turnout often proves more difficult than one might think at first blush.

Although many denominators could be contrived, the most popular employed are the voting age population, the citizen voting age population, and the eligible voting population. The choice among denominators—that is, turnout of *which* population—will affect one's inferences as to potential causes for lower turnout. For example, people have speculated for years as to why voter turnout has decreased in the United States over the past four decades.<sup>118</sup> Upon closer

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programming error resulted in the permanent loss of these votes. Dan Keating, *Lost Votes in N.M.: a Cautionary Tale: As Election Day Nears, a Look at Problems in 2000 Shows Fallibility of Machines*, WASH. POST, Aug. 22, 2004, at A5.

113. For a discussion of ways to improve the training and recruitment of poll workers, see CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 54-55.

114. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 10 (distinguishing between the “social problem” of fraud and the “engineering problem” of error).

115. See NAT’L COMM’N ON FED. ELECTION REFORM, *supra* note 83, at 6-14 (setting forth fourteen policy recommendations, including the implementation of statewide voter registration lists and provisional voting, the creation of a national holiday for presidential and congressional elections, and the drafting of federal standards for voting equipment).

116. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 10 (suggesting penalties for electoral fraud and improved detection methods to deter fraudulent voting practices).

117. Michael McDonald, *Voter Turnout*, UNITED STATES ELECTIONS PROJECT, [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm) (last visited July 17, 2010).

118. See generally WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER (1996) (a comprehensive attempt to explain electoral behavior in presidential elections); RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER (1992) (empirically analyzing why voter turnout rates have declined and examining potential ways to increase turnout); Paul R. Abramson & John

analysis, it appears that a statistical quirk has been responsible for much of the alleged recent decrease.<sup>119</sup> The share of the voting-age population that has turned out in each election does appear to have declined, but the share of the eligible population turning out has remained relatively constant. The perceived decrease has resulted from an increase in the share of non-citizens and prisoners in the voting age population due to high levels of immigration and incarceration.<sup>120</sup> Neither group can vote; therefore, increases in the ineligible share of the voting age population make it appear that a lower share of the population is actually turning out.

Correlates and causes of low voter turnout can be divided into institutional and individual characteristics. The institutional characteristics can be further divided according to electoral system features and election law regimes. The features of the electoral system concern the way votes are translated into seats or offices, whereas election law regimes tend to vary according to the ease with which eligible voters can vote.

Cross-national studies have identified a range of features of electoral systems that affect levels of voter turnout.<sup>121</sup> The clearest demarcation is between proportional representation systems and single-member district (SMD) plurality-based systems. Proportional systems, in which votes are directly translated into seat shares in the legislature, tend to produce higher levels of turnout than SMD systems, in which votes for losing candidates are effectively “wasted.”<sup>122</sup> Similarly, the number of viable political parties in a system seems to affect the turnout rate up to a point.<sup>123</sup> Increasing the number of parties past five or so

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H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 502 (1982) (suggesting that declining voter turnout is substantially the result of “weakening of party identification and declining beliefs about government responsiveness”).

119. The denominator for the voter turnout rate typically relies on the U.S. Census Bureau, which measures voting-age population (VAP), including people ineligible to vote, such as non-citizens, felons, and the mentally incompetent. Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 964 (2001).

120. See *id.* at 963.

121. See generally André Blais, *What Affects Voter Turnout?*, 9 ANN. REV. OF POL. SCI. 111 (2006) (reviewing the Powell and Jackman articles, as well as more recent research on voter turnout); Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 407-09 (1987) (discussing five major factors that influence voter turnout: nationally competitive districts, electoral disproportionality, multipartyism, unicameralism, and compulsory voting); G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 18 (1986) (arguing that the American institutional setting, particularly its party system and registration laws, severely inhibits voter turnout).

122. Powell, *supra* note 121, at 21 (“With proportional representation from the nation as a whole or from large districts, parties have an incentive to mobilize everywhere. With single-member districts, some areas may be written off as hopeless.”).

123. See AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITYAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 106-14 (1984) (describing benefits and critiques of the

appears to have a dampening effect on turnout.<sup>124</sup> This curvilinear relationship might be explained by the effect of the party system on attitudes toward political efficacy. Voters may prefer three or four parties to two, given that they may find in that range at least one party that effectively represents them.<sup>125</sup> As the number of parties grows beyond that, the translation of voter preferences gets blurred by deals made to secure a governing coalition, such that voters may sense that their individual vote is far removed from the actual choice of who will govern the country.<sup>126</sup> Fragile governing coalitions lead to greater uncertainty in how an individual's vote will translate to a shift in government policy.

As electoral systems may vary in the way they translate votes into seats, election law regimes vary in how easy they make voting. Of course, countries that explicitly disenfranchise groups of voters, such as prisoners, new residents, or mentally incompetent people<sup>127</sup> (let alone women or racial minorities), may have marginally lower turnout due to such measures. The same could be said for countries where voters are intimidated from voting. But as discussed above, the main source of variation concerns the voting obstacles that different democracies impose. The frequent requirement of compulsory voting found in Latin America and elsewhere—such as Australia and Belgium—has an obvious effect on raising voter turnout, even when the penalties for not voting are quite low or the law goes unenforced.<sup>128</sup> Conversely, burdensome voter registration laws and a lack of government effort to register voters will suppress turnout. Beyond that, measures that make voting convenient represent a somewhat mixed bag. In the United States, it appears that same-day registration—that is, allowing new voters to register on the same day that they vote—somewhat heightens.<sup>129</sup> Early and absentee voting innovations, however, do not seem to have affected turnout much;<sup>130</sup> it appears that voters who choose those methods of voting would probably have voted anyway without those innovations.<sup>131</sup>

Although laws and electoral systems affect turnout levels, we know that demographic characteristics strongly predict whether an individual will vote.

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two-party system versus the multiparty system).

124. *Id.* at 120-23 (using the Laakso-Taagepera index to find that across twenty-two democracies, the effective number of parties ranged from two to five).

125. *Id.* at 113-14.

126. *See id.* at 110. *But see generally* AINA GALLEGOS ET AL., NUMBER OF PARTIES AND VOTER TURNOUT: EVIDENCE FROM SPAIN (2009), available at [http://polnet.wikispaces.com/file/view/Number\\_of\\_parties\\_and\\_voter\\_turnout.pdf](http://polnet.wikispaces.com/file/view/Number_of_parties_and_voter_turnout.pdf) (finding that the number of political parties has a positive effect on voter turnout, as those less in politics are more likely to vote when they have more choices).

127. *See supra* notes 84-86.

128. *See* Jackman, *supra* note 121, at 409 (noting that mandatory voting laws will, even if not enforced, lead to higher, but not perfect, voter turnout).

129. *See* Brians & Grofman, *supra* note 19, at 170 (finding that election day registration results in an increase in voter turnout of approximately seven percentage points in the average state).

130. *See* Fitzgerald, *supra* note 60, at 854-56.

131. *See* Gronke et al., *supra* note 62, at 642-43.

Education<sup>132</sup> and age tend to be the strongest predictors of turnout, with more educated and older voters being more likely to vote.<sup>133</sup> Unsurprisingly, those with a heightened sense of civic responsibility,<sup>134</sup> political efficacy,<sup>135</sup> and social connectivity<sup>136</sup> are more likely to turn out to vote. Those who have frequent contact with the government, either because they work closely with government<sup>137</sup> or in economic sectors highly dependent on government benefits,<sup>138</sup> are more likely to vote. The same is true for those with close connections to political parties or for members of groups who are closely aligned with political parties.<sup>139</sup> Of course, in countries where groups boycott elections or widespread fraud makes voting appear inconsequential, turnout will suffer.

### C. Incidences of Fraud

Fraud is the most difficult, and perhaps most important, electoral phenomenon to measure. Scholars have tried their best to do so with limited success. When successful, fraud by its nature will go undetected. Thus, capturing the amount of fraud in an electoral system requires fine-tuned assessments of what a fraud-free election would produce so that irregularities can be eradicated.

One must define fraud to measure it, and many definitions abound.<sup>140</sup> Fraud refers to more than election irregularities or the failure to count every vote; otherwise, a whole host of dysfunctions would be considered fraudulent. Moreover, officially sponsored disenfranchisement could be seen as fraud, but for the most part, fraud refers to efforts in secret or when those committing the fraud do not acknowledge the fraud. It generally refers to intentional, illegal action to alter vote totals so as to change the outcome of an election.<sup>141</sup> This could be done

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132. Similarly, education is positively correlated with citizen trust. R. Michael Alvarez et al., *Are Americans Confident Their Ballots Are Counted?*, 70 J. POL. 754, 763 (2008).

133. Carol A. Cassel & David B. Hill, *Explanations of Turnout Decline: A Multivariate Test*, 9 AM. POL. Q. 181, 186-87 (1981).

134. *Id.* at 182.

135. *Id.*

136. Marvin E. Olsen, *Social Participation and Voting Turnout: A Multivariate Analysis*, 37 AM. SOC. REV. 317, 317 (1972).

137. M. MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 31 (3d ed. 2000).

138. *Id.* at 30.

139. Cassel & Hill, *supra* note 133, at 182.

140. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 4 (Nov. 9, 2007), available at [http://brennan.3cdn.net/e20e4210db075b482b\\_wcm6ib0hl.pdf](http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf); LORRAINE C. MINNITE, PROJECT VOTE, *THE POLITICS OF VOTER FRAUD* 6, available at <http://www.bradblog.com/Docs/PoliticsofVoterFraudFinal.pdf> (last visited Sept. 3, 2010) (noting that there is no single accepted definition of voter fraud).

141. See MINNITE, *supra* note 140, at 6.

by traditional ballot box stuffing,<sup>142</sup> changing vote tallies, destroying votes, or obstructing voters who support particular candidates or parties.<sup>143</sup>

One way to “measure” fraud is to rely on official reports. One can look at the number of fraud prosecutions or incident reports at polling places.<sup>144</sup> One can also perform surveys of voters and election administrators to gather their assessments as to the extent of fraudulent action in a given election. Finally, post-election audits of ballots may shed light on irregularities occurring in certain areas.

The data and measurement challenge becomes how to identify patterns for which no reasonable alternative other than fraudulent behavior explains irregularities in the data. If an “unnatural” or aberrant number of votes appears to have been cast for a particular party in an area where the party should not have so performed, an inference of irregularity might be supportable. Moreover, if a pattern emerges—for example, when one party is in charge of the vote counting and a surprising number of votes appears to have been cast for its candidates—then similar inferences might be appropriate. In other words, the burden of proof might shift to those who would explain the irregularity as produced by something other than fraud.<sup>145</sup>

The more incompetent the fraud, the easier it is to detect. In some countries, it will be easy to point out that many more or many fewer ballots were counted in an election as compared to the number of voters who appeared at the polls or even the number of voters in a jurisdiction. When fraudsters are more sophisticated, statistical models can provide the necessary tools to unearth systematic irregularities. Such has been the case in recent elections in Russia,<sup>146</sup> Iran,<sup>147</sup> and Afghanistan,<sup>148</sup> for example. By comparing reported vote totals to what a statistical model would predict based on past behavior, turnout in the election, exit polls, and comparable statistics from around the country, one can

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142. For an example of absentee ballot box stuffing, see *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993).

143. For a discussion of the different categories of voter fraud, see Levitt, *supra* note 140, at 12-22.

144. See, e.g., ATT’Y GEN., U.S. DEP’T OF JUSTICE PUB. INTEGRITY SECTION, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2006, at 40-42 (2006), available at <http://www.justice.gov/criminal/pin/docs/arpt-2006.pdf> (describing a number of prosecutions for voter fraud cases).

145. See, e.g., Levitt, *supra* note 140, at 7-11 (compiling a list of the methodological flaws that result in allegations of voter fraud when in fact no such fraud exists).

146. Luke Harding & Tom Parfitt, *Fraud, Intimidation and Bribery as Putin Prepares for Victory*, GUARDIAN, Nov. 30, 1997, at 24, available at <http://www.guardian.co.uk/world/2007/nov/30/russia.politics>.

147. Farnaz Fassihi, *Iran Council to Investigate Election-Fraud Claim*, WALL ST. J. (June 16, 2009), <http://online.wsj.com/article/SB124505670198214769.html>.

148. Joshua Partlow & Pamela Constable, *Accusations of Vote Fraud Multiply in Afghanistan*, WASH. POST (Aug. 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/27/AR2009082704199.html>.

raise serious questions as to the legitimacy of reported results.

#### *D. Popular Trust and Confidence in the System*

Because fraud is difficult to prove with the specificity required by official observers, it is popular for critics to rely on perceptions of fraud. More generally, those seeking to combat fraud rely on popular confidence as the measure of a functioning electoral system. An electoral system cannot produce legitimate outcomes if the people do not trust the reported results. However, because a lack of confidence in the system can be the result of factors unrelated to actual administrative failures or intentional wrongdoing,<sup>149</sup> officials may find that popular confidence is a tricky value to satisfy.

One can measure such confidence at the level of elites or the mass public. In some democracies, elite boycotts of elections or mass protests could signal a lack of confidence. The propensity for litigation or criticism from the media or non-governmental organizations might also signal a lack of confidence. We can measure popular confidence by asking a representative sample of the population a series of survey questions directed at measuring their attitudes toward the electoral system. Questions such as “How much confidence do you have that your vote will be counted?” or “How confident are you that the declared winner in this election received the most votes?” can be complemented by more specific queries as to attitudes about polling place practices and election administration.<sup>150</sup>

To reiterate, attitudes toward the “system” often reflect respondents’ predispositions as to who they believe should have won the election. “Sour grapes” over legitimate election results are often expressed as a lack of confidence in the system. Isolating legitimate grievances against the election administration regime from mere complaints that the less preferable candidate won proves to be quite challenging.<sup>151</sup> Moreover, such feelings of confidence in the system are often reflective of attitudes toward government and the economy. The happier one is with government, the more likely one is to trust its election results. Those feelings toward government and social institutions will be affected by much more than behavior during elections. Tweaking the election administration regime can do little to assuage the concerns of people as to their position in life or the government’s responsibility for it.

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149. See *supra* notes 99-106 and accompanying text.

150. For example, one study designed to determine voters’ confidence in their vote being recorded correctly asked, “How confident are you that your ballot for president in the 2004 [, 2000 where applicable,] election was counted as you intended?” Respondents could choose from the following options: very confident, somewhat confident, not too confident, or not at all confident. These responses were then categorized into two groups: confident and not confident. After the 2000 election, 90.9% were confident their votes were counted, and after the 2004 election, 88.2% were confident that their votes were counted. See Alvarez, *supra* note 132, at 758.

151. See *supra* notes 99-106 and accompanying text.

## CONCLUSION

Generalizing international lessons from one country's experience is always a tricky business. Because of the panoply of problems it revealed in the electoral system of a leading democracy, the 2000 U.S. presidential election provides a useful template for categorizing the challenges each democracy faces in running elections. When elections are decided by a small number of votes, we feel the need to examine many features of the system that could have altered the outcome. Such inquiries can improve the functioning of the electoral system when it is not in the throes of a crisis.

While recognizing that every country is unique and its problems are embedded in a specific cultural, political, and institutional context, several lessons from the U.S. experience can be instructive beyond its shores. Most famously, the United States learned in 2000 how faulty technology (in this instance, punch-card ballots) can lead to millions of votes going uncounted.<sup>152</sup> The same could be said for problems with ballot design, which led to thousands of voter mistakes.<sup>153</sup> Fixing those technological problems proved more difficult than people first thought, as precipitous adoption of electronic voting came under fire for raising security questions and other concerns.<sup>154</sup> Nevertheless, the academic study of lost votes in the wake of the 2000 election provided a continuing gauge of the success of technological changes in translating expressed voter preferences into counted votes.

Those studies, however, revealed the importance of looking at the whole voting process—from “registration to recounts,” as one set of authors describes the “election ecosystem”<sup>155</sup>—to assess the proper functioning of an electoral system. Once those studies were done, the broader challenge of effective election administration came into sharp relief. The extreme decentralization of the U.S. system,<sup>156</sup> coupled with the lack of adequate expertise<sup>157</sup> and creeping partisanship at every stage,<sup>158</sup> constitute impediments to effective, widespread change that might ameliorate well-recognized problems. For international observers of the American experience, one lesson to take away is the disconnect between the law on the books and the practices on Election Day. As with technology, the impact of the finest and most specific laws will ultimately depend on the diligence and expertise of those administering them. The registration system is a case in point. Fixes put in place following the 2000 election have had a mixed impact, as localities and even polling places have varied considerably, for example, as to when they will grant a person the opportunity to vote by provisional ballot.<sup>159</sup>

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152. See *supra* Part I.B.

153. See *supra* text accompanying notes 50-53.

154. See *supra* notes 46-47 and accompanying text.

155. See HUEFNER ET AL., *supra* note 18, at 11-17.

156. See *supra* notes 1-4 and accompanying text.

157. See *supra* notes 5-7 and accompanying text.

158. See *supra* notes 8-14 and accompanying text.

159. See PEW CTR. ON THE STATES, *supra* note 37, at 5-6.

The same could be said for a variety of legal reforms governing elections in the United States and beyond: Any system that ultimately relies on humans to guide voters through the process and count their votes will fall prey to a series of potential human errors.

Although errors may be an inherent part of the electoral process, they can be minimized, and reforms can target errors with particular biases. Such efforts to ameliorate the types of problems that disadvantage particular communities, parties, or demographic subgroups should be the highest priority for a reform agenda in the United States and elsewhere. Although politicians and the public should relax their expectations of perfection for election administration, they have a right to expect that the imperfections will not put a thumb on the electoral scale for a particular group of people. With luck, focusing on that category of reforms will translate into widespread public confidence in the electoral system. Even if reformers are not so lucky, as can often be the case when confidence is tied to general attitudes toward government, addressing problems before they arise in the heat of an election can ward against the worst allegations of illegitimacy regarding the electoral process.



# PUBLIC RIGHTS AND PRIVATE RIGHTS OF ACTION: THE ENFORCEMENT OF FEDERAL ELECTION LAWS

DANIEL P. TOKAJI\*

## INTRODUCTION

In what circumstances should there be a private right of action to sue for violations of federal election statutes?<sup>1</sup> Lying at the intersection of federal courts and election law, this question has arisen in several recent cases,<sup>2</sup> as private litigants have increasingly called upon federal courts to resolve election disputes.<sup>3</sup> The question was before the U.S. Supreme Court in *Brunner v. Ohio Republican Party*.<sup>4</sup> The plaintiffs in *Brunner* alleged that a state chief election official had failed to follow the requirements of the Help America Vote Act of 2002 (HAVA) pertaining to statewide voter registration lists. In a one-paragraph, unanimous per curiam opinion, the Court held that a political party could *not* bring suit to enforce this requirement.<sup>5</sup>

The brevity of the *Brunner* decision masks the significance and complexity of the larger question. To be sure, under existing doctrine, the issue before the Court in *Brunner* was not a difficult one. In a series of opinions over the last four decades—only one of which involved elections<sup>6</sup>—the Court has sharply curtailed the private enforcement of federal statutory mandates. It has increasingly refused to imply private rights of action under federal statutes, absent a clear congressional intent to create both a right and a remedy.<sup>7</sup> More recently, the Court has declined to recognize a cause of action against state and local officials under 42 U.S.C. § 1983, unless the federal statute “unambiguously” confers an individual right.<sup>8</sup> This is a high bar, one that was not satisfied in *Brunner*, given that the statute in question imposed duties on state

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1. The terms “private right of action” and “private cause of action” both refer to a non-governmental litigant’s ability to bring suit to enforce a federal statute. This Article uses the former term.

2. For a discussion of these cases, see *infra* Part III.

3. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 89-90 (2009) (documenting increase in election litigation between 1996 and 2008 and the decreasing percentage of that litigation in state courts).

4. 129 S. Ct. 5, 6 (2008) (per curiam).

5. *Id.*

6. See *Cort v. Ash*, 422 U.S. 66 (1975), abrogated by *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). For a discussion of *Cort* and its progeny, see *infra* Part II.A.

7. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

8. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

officials without conferring a right on any identifiable individual.<sup>9</sup> Under established doctrine, then, *Brunner* was a straightforward case.

The problem is that existing private-right-of-action doctrine fails to account for the vital role that federal courts play in overseeing elections in the United States, especially through pre-election litigation. This failure is not surprising given that the doctrine on private rights of action was fashioned in other contexts. This Article argues that existing doctrine, particularly the requirement that there be an unambiguously conferred individual right, is inappropriate for alleged violations of federal election statutes.

The availability of a private right of action is especially critical in cases arising under election statutes such as HAVA—and the “unambiguously conferred right” test especially ill-fitting—for both conceptual and practical reasons. On a conceptual level, election cases typically involve non-individuated, collective interests.<sup>10</sup> Federal election statutes are not solely aimed at protecting the individual right to vote. Although this is one of the interests they may promote, federal election statutes also aim to serve systemic interests in a fair election process. These interests are not always reducible to individual harms and thus cannot adequately be served by a myopic focus on whether the statute unambiguously confers an individual right, as existing doctrine demands. It follows that the Court’s insistence on an unambiguously conferred individual right makes little sense in election cases. To apply such a test in the electoral context is like trying to pound a square peg into a round hole.

Existing doctrine is also problematic from a practical perspective, given the absence of any institution besides the federal courts with the ability to ensure consistency in the interpretation of federal law. The ultimate consequence is to leave the interpretation of federal election law in the hands of state officials, except in those rare instances when the federal government decides to get involved. This is troubling given the partisan affiliation of most state and many local election officials, which creates an inherent conflict of interest and makes federal judicial oversight especially important.<sup>11</sup> In the absence of a private right of action, the U.S. Attorney General functions as the gatekeeper to federal court. This exacerbates the conflict-of-interest problem, in light of the concerns of partisanship that have sometimes surrounded the Justice Department.<sup>12</sup>

For these reasons, this Article argues that the Court should revisit existing

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9. The statute at issue was 42 U.S.C. § 15483 (2006), which is part of HAVA.

10. See Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. (forthcoming 2011) (manuscript at 1) (arguing for broad standing in election law cases because they “often involve[] claims of harm to the electorate as a whole or to the democratic process itself”).

11. I discuss the conflict of interest faced by election officials at greater length in Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. (forthcoming 2010) [hereinafter Tokaji, *Lowenstein Contra Lowenstein*].

12. See Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 798-819 (2006) [hereinafter Tokaji, *If It’s Broke, Fix It*]. It raises the spectre of federal election statutes being enforced more aggressively—and perhaps only being enforced—where they benefit the party in control of the federal executive branch.

doctrine on private rights of action under § 1983 to facilitate more robust private enforcement of federal election statutes. Part I of this Article traces the evolving judicial role in overseeing elections during the past decade. It then puts the increased judicialization of U.S. election administration in comparative context by examining the electoral role played by politically independent institutions in other democratic countries. Part II discusses the Supreme Court doctrine on private rights of action, including both implied rights of action and claims under § 1983. In both these lines of precedent, the Court has made it increasingly difficult for private litigants to sue under federal statutes and regulations generally. As set forth in Part III, this general chariness has been extended—by the lower courts and by the Supreme Court in *Brunner*—to cases alleging violations of HAVA and other federal election statutes. Part IV argues that the Court’s stringent approach to private rights of action is ill-suited to election disputes, given that they involved quintessentially public rights for which a judicial forum is essential.

## I. FEDERAL COURTS AS ELECTION OVERSEERS

Almost a decade has passed since the 2000 presidential election. During this period, we have seen both unprecedented legislative attention to the administration of elections and a marked increase in election-related litigation.<sup>13</sup> Although this story is quite familiar to students of U.S. election administration, it is necessary to review both the precipitating causes of and the justifications for the judiciary’s more active involvement in overseeing election, in order to contextualize the doctrinal questions surrounding private rights of action. Such an examination reveals that federal courts serve a function in the American election system comparable to that played by politically independent electoral institutions in other countries.

### A. *Election Litigation in the United States*

The 2000s began, of course, with the dispute over the outcome of Florida’s presidential election and the Supreme Court’s decision in *Bush v. Gore*.<sup>14</sup> Shortly thereafter, lawsuits were brought in a number of states claiming that the punch-card voting systems used in Florida and other states violated federal law, including both the U.S. Constitution and the Voting Rights Act.<sup>15</sup> Specifically, plaintiffs claimed that these systems systematically disadvantaged voters who used them, having a particularly negative impact on minority voters. Two of these cases resulted in federal circuit court decisions holding that the use of

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13. See Hasen, *supra* note 3, at 89 (finding that the number of election-related disputes went from an average of ninety-four per year before 2000 to an average of 237 per year in the period between 2000 and 2008, peaking at 361 in 2004).

14. 531 U.S. 98 (2000).

15. For a description of this litigation, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1729-30, 1742-44, 1748-54 (2005) [hereinafter Tokaji, *The Paperless Chase*].

punch-cards violated the Equal Protection Clause, but both these decisions were subsequently vacated by en banc courts.<sup>16</sup> Enactment of HAVA, which set new voting standards and provided funds for the replacement of antiquated equipment, led to the virtual extinction of punch-card machines, while causing new disputes to emerge and find their way to federal court. Prominent among them were disputes over the security and reliability of touchscreen electronic voting systems, with some activists going to court to argue that these machines unconstitutionally denied their votes.<sup>17</sup> Challenges to electronic voting technology have not fared well in court, but that is not to say that they have been without impact. In fact, they have spurred legislative reforms—including the implementation of a voter-verified paper audit trail in many states—as well as greater administrative attention to the risks associated with new technology.<sup>18</sup>

Voting technology is not the only area in which courts have played a prominent role in the past decade. The enactment of HAVA in 2002 led to a new round of litigation that continued through the 2008 election season.<sup>19</sup> HAVA represented the federal government's most intensive intervention in the administration of elections in U.S. history. In addition to spurring the replacement of outdated voting equipment, HAVA imposed minimum standards for voter registration, provisional voting, and voter identification, applicable across the country. It also created an administrative agency, the Election Assistance Commission (EAC), to oversee the implementation of these requirements.

The degree of federal involvement in the conduct of elections should not be exaggerated. The requirements of HAVA are modest,<sup>20</sup> federal funding for elections is limited, and the EAC enjoys little power. While most other democracies have strong central election authorities,<sup>21</sup> Congress's decision not to create such an entity at the federal level was deliberate. As then-Representative Bob Ney, the primary Republican sponsor in the House, stated

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16. *Stewart v. Blackwell*, 444 F.3d 843, 869-70 (6th Cir. 2006), superseded by 473 F.3d 692 (6th Cir. 2007) (en banc); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd* (en banc), 344 F.3d 914 (9th Cir. 2003). The author was an attorney for plaintiffs in both cases.

17. Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1077-78 (2007) [hereinafter Tokaji, *Leave It to the Lower Courts*] (discussing these cases); see also Tokaji, *The Paperless Chase*, *supra* note 15, at 1800-01, 1801 n.607.

18. Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1078; see also Tokaji, *The Paperless Chase*, *supra* note 15, at 1774-80, 1791-94 (discussing security and transparency concerns associated with electronic voting systems and potential solutions).

19. See Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL'Y REV. ONLINE 1-2 (Jan. 22, 2009) [hereinafter Tokaji, *Voter Registration and Institutional Reform*], [http://www.hlpronline.com/wordpress/wp-content/uploads/2009/11/Tokaji\\_HLPR\\_012209.pdf](http://www.hlpronline.com/wordpress/wp-content/uploads/2009/11/Tokaji_HLPR_012209.pdf).

20. These requirements are discussed *infra* Part III.C.

21. See *infra* Part I.B.

during the legislative debate over HAVA, the EAC's title was "not an accident."<sup>22</sup> Its purpose was to provide *assistance* to the states, not to "dictate to States how to run their elections" or otherwise "impose its will on the States."<sup>23</sup> Thus, election administration remains mostly a matter of state law and local practice, as has been the case throughout U.S. history. Authority is largely devolved to the fifty chief election officials in the states and to thousands of local election officials at the state and local level.<sup>24</sup>

Despite the hyper-decentralization of American elections, and at least partly because of it, federal judicial oversight of elections has become a prominent feature of the post-2000 world. As Professor Rick Hasen has documented, the rise in election litigation during the 2000s was accompanied by a decrease in the proportion of cases filed in state as opposed to federal court.<sup>25</sup> Over eighty percent of election cases in the early 2000s were filed in state court, compared to only fifty-four percent in 2008.<sup>26</sup> Interestingly, the federal courts have opened their doors to election litigation,<sup>27</sup> even though the U.S. Supreme Court has adopted a hands-off posture in the election administration cases that have come before it since 2000<sup>28</sup>—and has treated *Bush v. Gore* as though it does not exist.<sup>29</sup>

In the 2004 election cycle, the State of Ohio provided especially fertile ground for federal litigation. The subjects of litigation included voting technology, provisional ballots, voter registration, voter identification, challenges to voter eligibility, and polling place operations.<sup>30</sup> The new requirements of HAVA, and uncertainty over the meaning of some of them, were partly responsible for this litigation. For example, voting rights activists in a number of states sued to require that provisional ballots be counted even if cast in the wrong precinct.<sup>31</sup> New requirements of HAVA also precipitated litigation in the 2008 election cycle. Most notable were disputes over HAVA's requirement of statewide registration databases to replace the local registration lists that

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22. 148 CONG. REC. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

23. *Id.*

24. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 130-31 (2009) [hereinafter Tokaji, *The Future of Election Reform*].

25. Hasen, *supra* note 3, at 90.

26. *Id.* at 91.

27. Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1072.

28. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (rejecting challenge to Indiana voter identification law without citing *Bush v. Gore*); *Purcell v. Gonzales*, 549 U.S. 1, 5-6 (2006) (reversing injunction against Arizona voter identification law, again without citing *Bush v. Gore*).

29. See Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 143-44 (2006); Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18.

30. Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214-18 (2005) [hereinafter Tokaji, *Early Returns*].

31. See *id.* at 1228-30.

dominated in most states.<sup>32</sup> In Wisconsin and Ohio, conservatives went to court seeking to require that new voters' registration information be "matched" against information in statewide registration databases<sup>33</sup>—and, as discussed more fully below, a case brought by the Ohio Republican Party on this ground made it up to the U.S. Supreme Court. For present purposes, the key point is that HAVA's new requirements are at least partly responsible for some of the litigation surrounding election administration in the post-2000 era.

It bears emphasis that, despite legal commentators' preoccupation with constitutional questions, some of the most important electoral disputes in this period have involved questions of federal statutory law—most conspicuously, the meaning of HAVA. This is partly attributable to the unavailability of any administrative agency with the power to clarify its meaning. The EAC lacks the power to promulgate binding regulations, except for in the narrow area of mail registration.<sup>34</sup> And in that narrow area, the EAC's bipartisan structure—with two Republicans, two Democrats, and a majority required to take action—has predictably led to stalemate on the most significant issue that it has faced.<sup>35</sup> Absent any other entity able to issue authoritative interpretations of HAVA, the courts have stepped in to fill the void, at least in part. They have issued decisions on whether states must count provisional ballots cast out of precinct,<sup>36</sup> whether states should issue provisional ballots to those who requested (but did not cast) an absentee ballot,<sup>37</sup> and, before the Court's ruling in *Brunner*, on the extent of states' obligations to match voter registration information against other databases.<sup>38</sup> While HAVA is the most important federal statute governing the administration of elections, it is not the only one whose meaning has become the subject of litigation. The past decade has also seen litigation over the National Voter Registration Act (NVRA),<sup>39</sup> a provision of the Civil Rights Act of 1964 concerning voter registration (42 U.S.C. § 1971), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and, of course, the Voting Rights Act

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32. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 471 (2008) [hereinafter Tokaji, *Voter Registration and Election Reform*].

33. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008); Order at 4, *Van Hollen v. Gov't Accountability Bd.*, No. 08-cv-004085 (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php>. I have discussed the legal issue in these cases in some detail in Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 8-11.

34. 42 U.S.C. § 15329 (2006).

35. See Tokaji, *The Future of Election Reform*, *supra* note 24, at 135. That issue concerned the State of Arizona's requirement of proof of citizenship for voter registration. *Id.*

36. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 578 (6th Cir. 2004) ("There is no reason to think that HAVA . . . should be interpreted as imposing upon the states a federal requirement that out-of-precinct ballots be counted. . . .").

37. *White v. Blackwell*, 418 F. Supp. 2d 988, 991 (N.D. Ohio 2006).

38. *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008).

39. 42 U.S.C. §§ 1973gg-1973gg-10 (2006).

(VRA).

The active role of federal courts in overseeing election administration is understandable and, I contend, desirable.<sup>40</sup> With no administrative agency able to issue authoritative guidance on the meaning of federal law, courts are the only option. Otherwise, the interpretation of HAVA's requirements would be left to chief election officials in the states and to local election officials. This is problematic not only because it compromises the uniform implementation of federal law across the country, but also because of the partisanship that pervades state and local election administration. Election officials are typically elected or selected as representatives of their party, raising troubling questions about their impartiality. The majority of state chief election officials, usually the secretary of state, are elected as candidates of their party.<sup>41</sup> Even where state chief election officials are appointed rather than elected, the appointing authority is typically a partisan elected official. This arrangement is also problematic, raising doubts about whether the political appointee can be trusted to implement the law evenhandedly. A similar problem exists in many, though not all, localities. Most jurisdictions still elect their local election officials, and party-affiliated officials run elections in almost half of U.S. jurisdictions.<sup>42</sup>

Thus, despite the significant changes that have occurred in U.S. elections since 2000, the allocation of institutional authority remains largely unchanged. While HAVA was the federal government's most significant intervention in election administration in U.S. history, most day-to-day responsibility for running elections still lies at the state and local levels. American election administration thus remains very decentralized. Nor has there been much change in the partisanship of U.S. election administration. For all the criticism leveled at Florida's Secretary of State Katherine Harris in 2000 and Ohio's Secretary of State Ken Blackwell in 2004, party-affiliated state chief election officials are still the norm. This does not necessarily mean that election officials will discharge their duties in a biased manner; nor is it easy to discern when they are doing so. It does, however, create an inherent conflict of interest between election officials' duty to implement election laws impartially and the temptation to serve the political interests of their parties or themselves. The major institutional change that *has* occurred is the increased engagement of the federal judiciary, which serves as a vital check upon the otherwise decentralized and partisan administration of U.S. elections.<sup>43</sup>

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40. Tokaji, *The Future of Election Reform*, *supra* note 24, at 149-53.

41. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005).

42. David C. Kimball et al., *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 453 (2006); see also David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RES. 1257, 1261-62 (2006) (showing methods of selection in 4566 local electoral jurisdictions).

43. I elaborate on this argument elsewhere. See Tokaji, *The Future of Election Reform*, *supra* note 24, at 149-53; Tokaji, *Lowenstein Contra Lowenstein*, *supra* note 11.

### B. A Comparative Perspective

In both its decentralization and its partisanship, American democracy is distinctive.<sup>44</sup> These peculiar characteristics of our election systems make the federal courts important institutional players when it comes to the administration of elections.<sup>45</sup> To see why, it is helpful to compare U.S. electoral institutions to those in other countries, as well as international norms of election management. Two countries—India and France—provide particularly helpful points of comparison in understanding the vital role of the federal judiciary in overseeing U.S. elections.

The spread of democracy around the world is perhaps the most important global trend of recent decades. With this spread has come increasing attention to the characteristics that are necessary for a trustworthy and stable democratic system. Independence from partisan politics is increasingly viewed as a necessary component of such a system. As the influential European Commission for Democracy Through Law (also known as the “Venice Commission”) has put it: “Only transparency, impartiality and *independence from politically motivated manipulation* will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.”<sup>46</sup>

Democratic countries vary dramatically in the degree to which they satisfy this ideal. Globally, election management bodies can be divided into three broad categories.<sup>47</sup> The first and most common is an independent electoral commission, the structure that is now employed in most democratic countries.<sup>48</sup> The advantage of this model is that it tends to promote impartiality by insulating those running the election from political pressures. This is consistent with a growing

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44. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 82 (2004); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007) (reviewing ROY G. SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE (2006)).

45. See Pildes, *supra* note 44, at 83 (“Courts . . . are the primary American institution capable under current circumstances of addressing the central structural problem of self-entrenchment.”).

46. European Commission for Democracy Through Law [“Venice Commission”], *Code of Good Practice in Electoral Matters*, at 26, CDL-AD (2002) 23 (Oct. 30, 2002) (emphasis added), available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-e.pdf).

47. I discuss these in somewhat greater detail in Tokaji, *The Future of Election Reform*, *supra* note 24, at 137-41.

48. RAFAEL LÓPEZ-PINTOR, UN DEV. PROGRAMME, ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE 120 (2000), available at <http://www.undp.org/governance/docs/Elections-Pub-EMBbook.pdf>; see also LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 83-96 (2004); Oliver Ihl, *Electoral Administration*, in ENCYCLOPEDIA OF EUROPEAN ELECTIONS 87, 87-89 (Yves Deloye & Michael Bruter eds., 2007). All three of these sources describe the institutions that are responsible for managing elections in democratic countries. The discussion in the text mostly follows López-Pintor’s taxonomy.

recognition that such impartiality is essential to a fair democratic process.<sup>49</sup> Among the countries employing this model are Australia,<sup>50</sup> Canada,<sup>51</sup> and India.<sup>52</sup> The second category of election management is to entrust a government ministry with authority to oversee elections.<sup>53</sup> From the standpoint of ensuring independence from partisan politics, this structure might seem problematic, but it is the norm in many western European countries with a strong democratic tradition, including Belgium, Denmark, and Sweden.<sup>54</sup> The success of this model is probably attributable to the existence of a core of professional civil servants who are sufficiently insulated from political pressures.<sup>55</sup> The third model is for authority to be divided among different entities. Authority may be divided vertically, as in the U.S. system in which federal, state, and local actors have authority over elections. This dispersal of authority makes it difficult for any one group to “steal” an election, but, as I have already suggested, it also makes it difficult to ensure equal treatment across jurisdictions. Another way of dividing power is to do so horizontally, among different components of the national government. The leading example is the French system, in which a ministry runs presidential elections under the supervision of judicial actors.<sup>56</sup> Dividing authority in this way may also provide some assurance of impartiality, insofar as a relatively independent entity is looking over the shoulder of the government officials who are actually running the election.

The first model, an independent electoral commission, is properly viewed as the gold standard when it comes to election management.<sup>57</sup> Yet the United States and virtually all the individual states lack politically insulated bodies of this nature to run their elections.<sup>58</sup> The United States also lacks a core of professional

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49. INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, INTERNATIONAL ELECTIONS STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 37 (2002), available at <http://www.idea.int/publications/ies/index.cfm> (recognizing an “autonomous and impartial” electoral management body as an international election standard).

50. MASSICOTTE ET AL., *supra* note 48, at 90-91; LÓPEZ-PINTOR, *supra* note 48, at 27-28, 31.

51. Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 25 (2008).

52. David Gilmartin, *One Day's Sultan: T.N. Seshan and Indian Democracy*, 2 CONTRIBUTIONS TO INDIAN SOCIOLOGY 247 (2009) (describing how India’s electoral commission functions); LÓPEZ-PINTOR, *supra* note 48, at 27-28.

53. LÓPEZ-PINTOR, *supra* note 48, at 24.

54. *Id.* at 27, 59.

55. See Tokaji, *The Future of Election Reform*, *supra* note 24, at 140; see also Venice Commission, *supra* note 46, at 26 (“In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.”).

56. LÓPEZ-PINTOR, *supra* note 48, at 22, 60-61. This model is discussed further below.

57. See Venice Commission, *supra* note 46, at 26.

58. The only real exception is the State of Wisconsin, which has a Government

and politically independent civil servants that is needed in order to entrust election administration to a government ministry. This type of system is the norm, however, in most U.S. states.

To understand both of these shortcomings of election administration in the United States, it is helpful to contrast our system with that of the world's largest democracy: India. With an election administration apparatus that is both centralized and insulated from partisan politics, India is the polar opposite of the United States. To American observers, the degree of independence that India's Election Commission ("the Commission") enjoys—as well as the scope of authority it enjoys in executing its responsibilities—is almost unimaginable.<sup>59</sup> The Commission was established by India's 1950 Constitution, which gave it authority over the management of parliamentary and state legislative elections.<sup>60</sup> Over the ensuing six decades, the Commission has established broad control over the management of elections, with the assistance of India's Supreme Court, which has held that the Commission enjoys a broad "power to make all necessary provisions for conducting free and fair elections."<sup>61</sup> During the 1990s, under the leadership of Chief Election Commissioner T.N. Seshan, the Commission successfully increased its authority during "electoral time," while successfully fending off attempts to compromise its independence.<sup>62</sup>

The degree of control that the Commission enjoys during electoral time is enormous. During the period before and during an election, the Commission has almost plenary authority to commandeer government workers from other government agencies, to put them in service of running elections.<sup>63</sup> The Commission's ability to draw on a professional cadre of civil servants—in contrast to the largely volunteer force that U.S. jurisdictions must mobilize on its election days—provides it with a noteworthy advantage. The Commission has

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Accountability Board that is responsible for overseeing elections. *See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* 115-17 (2007); <http://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/index.php>.

59. *See* Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 429 (2006) (identifying India's Election Commission as leading example of an entity empowered to make and enforce election rules).

60. Under the Constitution of India, the Commission is responsible for the "superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President." INDIA CONST. Dec. 1, 2007, art. 324, § 1; *see also* VASSIA GUEORGUIEVA & RITA S. SIMON, *VOTING AND ELECTIONS THE WORLD OVER* 143-48 (2009) (describing structure and functions of India's Election Commission).

61. Elmendorf, *supra* note 59, at 429 (quoting *Union of India v. Ass'n for Democratic Reforms*, 2 L.R.I. 305 (2002)).

62. Gilmartin, *supra* note 52, at 253. For an illuminating discussion of restrictions on political expression during electoral time, see Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1423-29 (2007).

63. Gilmartin, *supra* note 52, at 254-55.

also promulgated a Model Code of Conduct that is in force during electoral time.<sup>64</sup> Accordingly, it enjoys the authority to punish violations through the threat of cancelling or nullifying elections.<sup>65</sup> As a practical matter, then, the Commission enjoys extremely broad authority during electoral time, and it has often made and implemented rulings that are unpopular with the ruling party.<sup>66</sup> It also enjoys a high degree of credibility with the public compared to other institutions, even including India's judiciary.<sup>67</sup> The independence and status of the Commission has allowed India's judiciary, including its Supreme Court, to play a back-seat role in overseeing elections. Indian courts have adopted a highly deferential posture toward rulings of the Commission made during electoral time.<sup>68</sup>

The Indian Election Commission's broad powers during electoral time, along with the widespread perception that it stands "above politics,"<sup>69</sup> gives it a status that election management bodies in the United States simply do not enjoy. It may eventually be possible to develop comparably independent electoral institutions in the United States. Indeed, the State of Wisconsin has recently attempted to do so, through the creation of a Government Accountability Board staffed with former judges, who must be confirmed by a supermajority of the state legislature—a structure that is designed to ensure impartiality in the Board's operations.<sup>70</sup> For the time being, however, election administration is likely to remain in the hands of party-affiliated actors in most U.S. states and many localities. Therefore, in the here and now, there must be some means by which to induce those officials to act impartially. As the U.S. institution that is most insulated from partisan politics, the federal judiciary is best suited to perform this function.<sup>71</sup>

To understand the functional role that federal courts can and should play in the United States, it is helpful to compare the French electoral system. France has a more centralized system than the United States.<sup>72</sup> The Ministry of Internal

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64. *Id.*

65. *Id.* at 256.

66. *Id.* at 257.

67. Peter Ronald deSouza, *The Election Commission and Electoral Reforms in India, in DEMOCRACY, DIVERSITY, STABILITY: 50 YEARS OF INDIAN INDEPENDENCE* 51, 52-53 (1998).

68. Anurag Tripathi, *Election Commission of India: A Study* 19 (manuscript Mar. 19, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1575309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575309) ("The Supreme Court of India has held that where the enacted laws are silent or make insufficient provision to deal with a given situation in the conduct of elections, the Election Commission has the residuary powers under the Constitution to act in an appropriate manner.").

69. Gilmartin, *supra* note 52, at 281.

70. HUEFNER, TOKAJI & FOLEY, *supra* note 58, at 115; Tokaji, *The Future of Election Reform*, *supra* note 24, at 144.

71. See Pildes, *supra* note 44, at 83.

72. Noëlle Lenoir, *Constitutional Council Review of Presidential Elections in France and a French Judicial Perspective on Bush v. Gore*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000*, at 295, 305-06 (Arthur J. Jacobsen & Michael Rosenfeld eds.,

Affairs oversees elections throughout the country, but (as in the United States) authority is dispersed among local entities.<sup>73</sup> The most significant feature of France's election system—one that is both similar to and different from the United States—is the role that courts play in overseeing elections.<sup>74</sup> The 1958 Constitution created the French Constitutional Council and entrusted it with responsibility for resolving disputes in presidential and parliamentary elections,<sup>75</sup> while administrative courts (with the Conseil d'Etat at the top of the ladder) have responsibility for regional and local elections.<sup>76</sup> These bodies, while usually characterized as courts, serve both a judicial and an administrative function when it comes to elections, including responsibility for the counting of votes and announcement of results.<sup>77</sup> For presidential elections, the Constitutional Council "monitors the whole chain of electoral operations from the beginning of the preparation of the instruments organizing the election to the declaration of the final results and the name of the elected president."<sup>78</sup> In terms of the number of decisions it issues, the Constitutional Council is predominantly an electoral court, with three-quarters of its decisions involving elections, with the number of decisions increasing sharply in the 1990s.<sup>79</sup> It has been described as an "engine by which the 'judicialization of politics' has grown in France."<sup>80</sup> Its functions include advising the government on actions concerning elections, considering the legality of administrative actions, providing information for voters, supervising the conduct of elections and reporting incidents, and announcing the results.<sup>81</sup> The Constitutional Council thus plays an active role before, during, and after elections, functioning as a sort of "election monitor."<sup>82</sup>

The jurisdiction of the French Constitutional Council extends well beyond

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2002).

73. GUEORGUIEVA & SIMON, *supra* note 60, at 45.

74. LÓPEZ-PINTOR, *supra* note 48, at 60-61.

75. 1958 CONST. art. 58 (Fr.) ("(1) The Constitutional Council shall ensure the regularity of the election of the President of the Republic. (2) It shall examine complaints and shall proclaim the results of the vote."); *see also* Lenoir, *supra* note 72, at 297; LOPEZ-PINTOR, *supra* note 48, at 61.

76. LÓPEZ-PINTOR, *supra* note 48, at 60-61; Kieran Williams, *Judging Disputed Elections in Europe*, 8 ELECTION L.J. 277, 278 (2009).

77. LÓPEZ-PINTOR, *supra* note 48, at 61; Lenoir, *supra* note 72, at 299. *But see* Williams, *supra* note 76, at 278 (noting that the Constitutional Council "sits outside the judiciary and is composed as much of onetime politicians . . . and civil servants as of career judges").

78. Lenoir, *supra* note 72, at 299.

79. Sylvain Brouard, *The Constitutional Council: The Rising Regulator of French Politics*, in THE FRENCH FIFTH REPUBLIC AT FIFTY: BEYOND STEREOTYPES 99, 106-07 (Sylvain Brouard et al. eds., 2009).

80. *Id.* at 116 (citation omitted).

81. Jean-Louis Debre, President, Constitutional Council, Statement on the Role of the French Constitution Council in National Polls (July 16, 2007), available at [http://www.conseil-constitutionnel/root/bank\\_mm/pdf/Conseil/20070716Debre.pdf](http://www.conseil-constitutionnel/root/bank_mm/pdf/Conseil/20070716Debre.pdf).

82. Lenoir, *supra* note 72, at 304.

that of federal courts in the United States. The Council considers matters that would be deemed nonjusticiable political questions in the U.S. federal courts. At the same time, a fruitful comparison can be made in the broad range of topics the Constitutional Council addresses. It considers questions that arise before, during, and after elections, providing a check on the ministry that runs the election. In effect, this allows the Constitutional Council to look over the shoulder of the government officials running elections.

Comparison of the U.S. system with that of India and France thus helps illuminate the role that the judiciary—and specifically the federal courts—plays in the administration of elections. The increased role of courts, especially the federal courts, in overseeing the conduct of elections can be seen as a response to the decentralization and partisanship of U.S. elections. For the most part, election administration in the United States remains a matter of state law and local practice. The United States lacks an independent electoral commission like India's and does not have courts that are specifically entrusted with a broad-ranging review of the conduct of elections, as in France. With the enactment of HAVA's new nationwide requirements in 2002, and without a federal agency capable of promoting consistency in the interpretation of the law, federal courts were left to fill this void.<sup>83</sup> Given the absence of other U.S. institutions that are sufficiently insulated from partisan politics, the federal courts are best suited to perform this role. Unfortunately, as I shall explain in Parts II and III, federal courts are hampered by the restrictive legal doctrine on when private litigants can bring suit to enforce federal statutory law.

## II. PRIVATE RIGHTS OF ACTION

As explained in Part I, federal courts play an important role with respect to the conduct of U.S. elections. For the most part, the United States lacks election management bodies that are independent of partisan politics as in India, or a formal system of dividing electoral authority as in France. While it would be naive to believe that judges are apolitical, federal courts enjoy greater insulation from politics than the other players in our election system. Accordingly, it is valuable for those courts to look over the shoulder of party-affiliated election officials. One way of doing so is through constitutional adjudication, though this is an awkward tool at best. Constitutionalizing election rules may strain judicial competence. It may also induce even greater resentment by the losing side, given the practical impossibility of overruling a constitutional ruling as opposed to a statutory one. Greater constitutionalization of election administration is also an enterprise that the U.S. Supreme Court has been reluctant to engage in—as suggested by its reluctance even to cite *Bush v. Gore*<sup>84</sup> in the decade after which that momentous case was decided.<sup>85</sup>

An alternative means for federal courts to oversee the administration of

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83. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

84. 531 U.S. 98 (2000).

85. Flanders, *supra* note 29, at 144; Cohen, *supra* note 29.

elections is through their interpretation of the federal statutes governing this area, most notably HAVA. The federal courts have decided some important cases under federal election administration statutes in recent years.<sup>86</sup> Yet their ability to act in this area is impeded by two obstacles. One is the absence of an express private right of action under HAVA and some other election statutes. The other is the restrictive doctrine that the Supreme Court has crafted over the past four decades, on when a private right of action may be implied—either directly or under § 1983.

#### A. *Implied Rights of Action*

Common law courts generally permitted private persons claiming a violation of state statutes to seek redress, so long as they were among the class the statute purported to protect.<sup>87</sup> The implication of a right of action is rooted in the Blackstonian principle, famously asserted in *Marbury v. Madison*,<sup>88</sup> that “where there is a legal right, there is also a legal remedy.”<sup>89</sup> In *Texas & Pacific Railway Co. v. Rigsby*, decided in 1916, the Supreme Court explicitly recognized that a plaintiff could bring suit under a federal statute that did not expressly create a private right of action.<sup>90</sup> According to *Rigsby*, “disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied.”<sup>91</sup> Despite this pronouncement, it was not very common for the Supreme Court to imply private rights of action for the next half century or so.<sup>92</sup>

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86. See generally Tokaji, *Early Returns*, *supra* note 30; Tokaji, *Voter Registration and Election Reform*, *supra* note 33; Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19.

87. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U.CHI.L.REV. 394, 411-12 (1982).

88. 5 U.S. (1 Cranch) 137 (1803).

89. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23); see also Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U.L.REV. 681, 696 (2009) (describing roots of implied right of action doctrine in *Marbury* and BLACKSTONE).

90. Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 41 (1916).

91. *Id.* at 39.

92. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court’s Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C.DAVIS L.REV. 283, 294 (1996); see also Cannon v. Univ. of Chi., 441 U.S. 677, 733 (1979) (Powell, J., dissenting) (asserting that, for almost fifty years after *Rigsby*, the only other statute under which the Court had recognized an implied right of action was the Railway Labor Act of 1926). This appears to be a disputed point. Professor Sunstein asserts that federal courts used their common law powers recognized in *Swift v. Tyson* to permit rights of action for violations of federal law, even after *Erie Railroad v. Tompkins*. Sunstein, *supra* note 87, at 411-12. But Professor Sunstein does not cite any Supreme Court decisions actually doing so between *Rigsby* and *Borak*. See Richard

Implying a right of action for violations of federal laws allowed non-governmental entities to serve as private attorneys general, a “progressive” legal reform supported by liberals and conservatives alike.<sup>93</sup> The case that did most to encourage the implication of private rights of action was the Supreme Court’s 1964 decision in *J.I. Case Co. v. Borak*.<sup>94</sup> Plaintiff Borak was a shareholder of defendant corporation alleged to have made a deceptive proxy solicitation in violation of § 14(a) of the Security and Exchange Act of 1934.<sup>95</sup> The Court acknowledged that the language of the statute “makes no specific reference to a private right action,” but adverted to the underlying purposes of the statutes, most notably “‘the protection of investors,’ which certainly implies the availability of judicial relief where necessary to achieve that result.”<sup>96</sup> The Court also took notice of the fact that the harm asserted “results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders *as a group*.<sup>97</sup> The collective nature of the harm made a private right of action especially vital in the Court’s view.<sup>98</sup> As Richard Stewart and Cass Sunstein have explained, the reason for creating a right of action was to protect “a diffuse collective good,” rather than simply to provide redress to individual victims.<sup>99</sup> Even though the Securities and Exchange Commission had the concurrent power to enforce § 14(a), leaving enforcement to this agency alone was inadequate given its limited ability to thoroughly examine all the proxy statements it received and assess the harms that might be done by misrepresentations. The federal courts, therefore, had not just the power but the duty to provide remedies necessary to effectuate Congress’s purpose—including both prospective relief and damages—despite the fact that the statute did not explicitly authorize shareholders like Borak to sue.<sup>100</sup> Put simply, the Court believed a private right of action was necessary to make the statute work.<sup>101</sup>

*Borak* triggered a wave of decisions in the next decade implying private rights of action under various federal statutes.<sup>102</sup> During this golden era for

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B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1300-06 (1982) (reviewing history of private rights of action in various contexts).

93. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007).

94. 377 U.S. 426 (1964).

95. *Id.* at 427.

96. *Id.* at 432 (quoting Security and Exchange Act of 1934, 15 U.S.C. § 78n(a) (2006)).

97. *Id.* (emphasis added).

98. *Id.* at 432-33.

99. Stewart & Sunstein, *supra* note 92, at 1303.

100. *Borak*, 377 U.S. at 433.

101. Berzon, *supra* note 89, at 697.

102. Key, *supra* note 92, at 294-95; see also PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 164 (6th ed. 2008) (“In the decade following [*Borak*], the lower courts routinely recognized private rights of action to enforce federal regulatory provisions.”); Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v.*

implied rights of action, the principal focus was on whether the statute protected a special class of people that included the plaintiff.<sup>103</sup> If they were, then a private right of action was generally implied. Among the laws under which the Supreme Court recognized private rights of action were statutes regulating the financial sector<sup>104</sup> and protecting civil and political rights.<sup>105</sup>

An example is *Allen v. State Board of Elections*,<sup>106</sup> in which the Court implied a right of action for voters claiming that their states had implemented new electoral rules without complying with § 5 of the then-new Voting Rights Act of 1965.<sup>107</sup> Under § 5, covered jurisdictions—at the time, states and political subdivisions in the South—are required to obtain preclearance of electoral changes before those changes may go into effect. At issue in *Allen* was whether the states' electoral changes counted as “qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” which had to be precleared.<sup>108</sup> *Allen* is mostly known for its capacious interpretation of § 5, holding that it is not limited to practices limiting who may vote but also includes at-large election schemes and other rules that might limit the effectiveness of minority votes<sup>109</sup>—in other words, that § 5 applies to vote dilution as well as vote denial.<sup>110</sup> But *Allen* is also important for its holding that private citizens had a right to sue states that had failed to obtain § 5 preclearance. The VRA did not explicitly grant minority voters the right to sue in these circumstances, and the Court might have held that only the U.S. Department of Justice could sue to stop a state from implementing an un-precleared electoral change.<sup>111</sup> The *Allen* Court,

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Doe, 39 Hous. L. Rev. 1417, 1423 n.31 (2003) (noting that the Supreme Court and lower courts found implied rights of action under several statutes between 1964 and 1975).

103. Key, *supra* note 92, at 295 (citing Stephen E. Ronfeldt, *Implying Rights of Action for Minorities and the Poor Through Presumptions of Legislative Intent*, 34 Hastings L.J. 969, 977 (1983)).

104. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970).

105. See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Allen v. Bd. of Elections*, 393 U.S. 544 (1969).

106. 393 U.S. 544 (1969).

107. *Id.* at 548.

108. *Id.* at 563 (quoting 42 U.S.C. § 1973c (2006)).

109. *Id.* at 565-66.

110. For a discussion of this distinction and *Allen*'s significance in extending § 5 to vote dilution, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691-92, 703 (2006) [hereinafter Tokaji, *The New Vote Denial*].

111. The Court would later distinguish *Allen* in *Morris v. Gressette*, 432 U.S. 491 (1977), which held that the Justice Department's right to grant administrative preclearance under § 5 is not subject to judicial review. *Id.* at 506-07. In that case, voters sought to challenge the Justice Department's decision not to object to a South Carolina reapportionment plan. *Id.* at 493. The majority relied on the legislative history of the VRA, which it characterized as showing Congress's intent to provide speedy method of complying with § 5. *Id.* at 503. Because judicial review of decisions granting preclearance would delay resolution of § 5 disputes, the Court concluded that

however, concluded that the VRA's goals "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."<sup>112</sup> As in *Borak*, the Court alluded to the limited enforcement resources at the government's disposal and Congress's intent to protect a class of citizens.<sup>113</sup> The collective nature of the harm—including the representational injury to minorities whose voting strength was diluted—were thus an important part of the justification for implying a right of action.<sup>114</sup>

The decline of implied rights of action began just over a decade after *Borak*, with the unanimous decision in *Cort v. Ash*.<sup>115</sup> *Cort* was both an election case (like *Allen*) and a shareholder derivative case (like *Borak*). Plaintiff Ash was a shareholder seeking to sue Bethlehem Steel and its directors for violations of criminal provisions of the Federal Election Campaign Act (FECA) Amendments of 1974.<sup>116</sup> Specifically, Ash alleged that the corporation and its directors had violated a federal law<sup>117</sup> prohibiting corporations from making contributions or expenditures in connection with a federal election, seeking both injunctive relief and damages.<sup>118</sup> Justice Brennan's opinion for the Court first concluded that the administrative procedure set forth in the FECA amendments, under which complaints were to be filed before the newly created Federal Election Commission (FEC), was the sole means by which to secure injunctive relief for violations of § 610 in future elections.<sup>119</sup> Turning to the shareholders' damages claim, the Court articulated a four-factor test for ascertaining whether a cause of action should be implied: (1) whether plaintiff is "one of the class for whose especial benefit the statute was enacted"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether implication of a right of action is "consistent with the underlying purposes of the legislative scheme"; and (4) whether the claim is one "traditionally relegated to state law, in an area basically the concern of the States," thus making implication of a private right of action under federal law inappropriate.<sup>120</sup> While the Court noted the absence of any indication that Congress intended civil enforcement of § 610, its analysis rested primarily on the fact that protection of shareholders was, at best, a subsidiary purpose of the

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Congress could not have intended these decisions to be reviewable. *Id.* at 506-07.

112. *Allen*, 393 U.S. at 556.

113. *Id.* at 557.

114. In a later decision, *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a majority of the Court relied on *Allen* to find an implied right of action to enforce § 10 of the VRA, which prohibits poll taxes. *Id.* at 230-35; *id.* at 240 (Breyer, J., concurring).

115. 422 U.S. 66 (1975), abrogated by *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

116. *Id.* at 66.

117. 18 U.S.C. § 610 (2009).

118. *Cort*, 422 U.S. at 71-72.

119. *Id.* at 75-76.

120. *Id.* at 78.

statute.<sup>121</sup> According to the Court, Congress's main motivation was to reduce the influence of money on federal elections.<sup>122</sup> The absence of a "clearly articulated federal right in the plaintiff" led the Court to decide against implying a right of action.<sup>123</sup>

Although *Cort* denied a private right of action, its reasoning is consonant with *Borak*. In both cases, the central question was whether the plaintiff was part of the class that the statute was designed to protect. In addition, *Cort* left room for courts to consider the policy implications of implying a private right of action, including whether it would help or hurt the underlying regulatory scheme.<sup>124</sup>

At the same time, the *Cort* test suggests an underlying tension between two different conceptions of whether a private right of action should lie.<sup>125</sup> On one view, the one borrowed from *Borak*, the question is whether the statute was designed to benefit an identifiable class of persons that includes the plaintiff.<sup>126</sup> On the other view, the question is whether Congress intended to confer a right of action on private plaintiffs.<sup>127</sup>

The tension between these perspectives, latent in *Cort*, came to a head four years later in *Cannon v. University of Chicago*.<sup>128</sup> The plaintiff in *Cannon* alleged that she had been denied admission to federally funded educational institutions on the basis of her sex, in violation of Title IX of the Civil Rights Act.<sup>129</sup> The majority opinion, authored by Justice Stevens, applied the *Cort* factors to find an implied right of action for injunctive relief.<sup>130</sup> Although affirmative evidence of a congressional intent to confer a right of action was lacking, the Court rested heavily on the fact that the statute was designed to benefit a class, of which the plaintiff was a member.<sup>131</sup> It also relied on the "contemporary legal context" of the statute.<sup>132</sup> The statute was enacted during the period after *Borak* and before *Cort*, during which private rights of action were routinely implied, and it was appropriate to presume congressional familiarity with these precedents.<sup>133</sup> Justice Powell's dissent, by contrast, insisted that

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121. *Id.* at 80-81.

122. *Id.* at 81-82.

123. *Id.*

124. Sunstein, *supra* note 87, at 412.

125. See Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1078 (1992).

126. Bruce A. Boyer, Note, *Howard v. Pierce: Implied Causes of Action and the Ongoing Vitality of Cort v. Ash*, 80 NW. U. L. REV. 722, 732 (1985).

127. *Id.* This view is evident in Justice Powell's opinion for the Court in *Morris v. Gressette*, discussed *supra* note 111.

128. 441 U.S. 677 (1979).

129. *Id.* at 677.

130. *Id.* at 689-709.

131. *Id.* at 693-94.

132. *Id.* at 699.

133. *Id.* at 731-32 (Powell, J., dissenting).

clearer evidence of Congress's intent to confer a private right of action was required. Taking issue with *Cort*'s four-factor test, Justice Powell insisted that "[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action."<sup>134</sup> The only factor that should matter, in Justice Powell's view, was congressional intent to create a right of action. To consider other factors, he argued, was an "open invitation to federal courts to legislate causes of action not authorized by Congress," running afoul of the principle of separation of powers.<sup>135</sup>

Although Justice Powell's position did not carry the day in *Cannon*, the Court has increasingly gravitated toward his intent-based test in the years since that case was decided.<sup>136</sup> Just a month after *Cannon*, the Court in *Touche Ross & Co. v. Redington*<sup>137</sup> refused to imply a private right of action in a securities case, stating that "our task is limited solely to determining whether Congress intended to create the private right of action asserted."<sup>138</sup> The Court similarly relied on the absence of congressional intent to create a right of action in subsequent cases seeking damages for statutes prohibiting fraudulent investment practices<sup>139</sup> and a right to contribution from other participants in an unlawful conspiracy.<sup>140</sup> A majority of the Court backed off a bit from its insistence on evidence of congressional intent in *Thompson v. Thompson*.<sup>141</sup> While denying a private right of action to seek an injunction against a Louisiana custody decree under the Parental Kidnapping and Prevention Act of 1980, the Court emphasized that affirmative evidence of congressional intent was not necessarily required.<sup>142</sup> Some other decisions in the post-*Cannon* period have recognized a private right of action, particularly for statutes passed during the period in which they were routinely implied.<sup>143</sup> Still, the Court has moved much closer to Justice

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134. *Id.* at 731.

135. *Id.*

136. Mazzuchi, *supra* note 125, at 1076, 1078.

137. 442 U.S. 560 (1979).

138. *Id.* at 568.

139. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

140. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

141. 484 U.S. 174 (1988).

142. *Id.* at 179 (clarifying that "[o]ur focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action").

143. See *Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34 (1996) (relying on the contemporary legal context of the VRA to imply a right of action to enforce prohibition on poll taxes); *Musick, Peeler & Garrett v. Emp'r's Ins. of Wausau*, 508 U.S. 286, 292-93 (1993) (implying a right of action under Rule 10b-5, promulgated under § 10(b) of the Securities and Exchange Act of 1934); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (implying a right of action for damages under Title IX of the Civil Rights Act); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (implying a right of action under Rule 10b-5, promulgated under § 10(b) of the Securities and Exchange Act of 1934); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387-88 (1982) (implying a right of action under the Commodity Futures Trading

Powell's position requiring clear evidence of Congress's intent to create a private right of action.

The most striking contemporary example of the Court's restrictive approach is *Alexander v. Sandoval*.<sup>144</sup> The plaintiff in *Alexander* sought to challenge the Alabama Department of Public Safety's English-only policy, arguing that it violated disparate-impact regulations promulgated by the Department of Justice under Title VI of the Civil Rights Act.<sup>145</sup> While *Cannon* implied a right of action for private individuals to sue *directly* under Title VI, the statute itself only covers intentional discrimination.<sup>146</sup> To make a disparate-impact claim, then, it was necessary to imply a right of action in plaintiff's favor under Title VI regulations. Justice Scalia's opinion for the Court rejected such a private right of action, reasoning that "private rights of action to enforce federal law must be created by Congress,"<sup>147</sup> and that Congress had created no such right.

In ascertaining whether a right of action was created, the *Alexander* majority—consistent with Justice Scalia's textualist approach—looked to the language of the statute: "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."<sup>148</sup> In this respect, the majority opinion did not simply embrace Justice Powell's view from his dissent in *Cannon* that there must be "compelling evidence"<sup>149</sup> of congressional intent to create a right of action, but goes further. It suggested that this evidence must come from the statute itself. The *Alexander* opinion thus represents the clearest break from the *Borak* view that a right of action should generally be inferred when plaintiff is of the class the statute was designed to benefit. Justice Scalia's opinion for the Court makes this point explicitly by labeling the plaintiff's contrary argument as an attempt to "revert . . . to the understanding of private causes of action that held sway 40 years ago."<sup>150</sup> In characteristically colorful fashion, Justice Scalia declined the invitation: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."<sup>151</sup> Looking to the statutory text, the majority found neither "rights-creating" language nor the "intent to create a private remedy."<sup>152</sup> The Court also rejected the argument that language in the regulations is relevant to the question. The sole issue, instead, was whether the statute evinces congressional intent to create a private right and

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Commission Act).

144. 532 U.S. 275 (2001).

145. *Id.* at 279.

146. *Id.* at 280-81; *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

147. *Alexander*, 532 U.S. at 286.

148. *Id.* (citing *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).

149. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

150. *Alexander*, 532 U.S. at 287.

151. *Id.*

152. *Id.* at 288-89.

remedy.<sup>153</sup>

As *Alexander* exemplifies, the Court has moved toward a much more restrictive view of implied rights of action. In the decade or so following *Borak*, the Court was quite generous in implying rights of action, especially where a plaintiff alleged a collective harm and was among the class experiencing that harm. Prime examples were the minority voters in *Allen* who claimed that injury to their collective interest in fair representation by virtue of vote dilutive election practices.<sup>154</sup> Since 1975, the focus has increasingly narrowed to whether the statutory text shows a congressional intent to create both an individual right and a private remedy.

### *B. Rights of Action Under § 1983*

For plaintiffs seeking to sue state or local officials for violations of federal statute, there is an alternative route for asserting a private right of action. Section 1983 confers a right of action on litigants whose rights under federal laws have been violated by a person acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory”<sup>155</sup>—that is, under color of state law. As with implied rights of action, the Supreme Court has made it increasingly difficult for private litigants to bring suit under § 1983 for federal statutory violations. Although the two tests are not identical, plaintiffs now must show that Congress intended to confer an individual right (though not necessarily a remedy) in order to sue under § 1983. In addition, the Court will sometimes infer that Congress intended to preclude a § 1983 right of action, where the statute contains an alternative remedial scheme.

The seminal case for private plaintiffs suing under § 1983 for statutory violations is *Maine v. Thiboutot*.<sup>156</sup> Plaintiffs in *Thiboutot* alleged that the State of Maine and its officials had violated a provision of the Social Security Act by denying them welfare benefits to which they were entitled.<sup>157</sup> Because the relevant provision of the Social Security Act contained no private right of action, plaintiffs sought to make their claim under § 1983, citing the statute’s language allowing claims for violations of the “Constitution and laws.”<sup>158</sup> The Court rejected the state’s argument that § 1983 only provided a right of action for

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153. For a similar view, see *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (“[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one. . . .”).

154. *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969).

155. 42 U.S.C. § 1983 (2006).

156. 448 U.S. 1 (1980); *see also Key, supra* note 92, at 320 (noting that *Maine v. Thiboutot* was the first case to confront the meaning of § 1983’s “and laws” language).

157. *Thiboutot*, 448 U.S. at 2-3.

158. 42 U.S.C. § 1983 (emphasis added). Section 1983 was originally part of the Civil Rights Act of 1871. The phrase “and laws” was added in 1874 without any legislative history to explain the reason for the change. Mank, *supra* note 102, at 1427. For a discussion of the origins of § 1983, see Sunstein, *supra* note 87, at 398-409.

violation of statutes protecting equal rights.<sup>159</sup> Justice Brennan's opinion for the majority instead relied on the plain meaning of the term "and laws," as used in § 1983, concluding that it "means what it says" and was not limited to civil rights statutes.<sup>160</sup> As in *Cannon*, decided the previous term, Justice Powell dissented.<sup>161</sup> Relying on the legislative history of § 1983, he concluded that it provided a right of action only for federal statutes protecting equality of rights.<sup>162</sup> He also raised practical concerns about the majority's ruling, including the danger of litigation that would "harass state and local officials" and overly burden the courts.<sup>163</sup>

Although the Court has never adopted Justice Powell's position that § 1983 is limited to statutes protecting equal rights, it has imposed two major limitations on the availability of a § 1983 right of action to redress violations of federal statutes.<sup>164</sup> The first is that a § 1983 right of action is not available where it is precluded—expressly or implicitly—by the statutory scheme that the private plaintiff seeks to enforce. This limitation stems from *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, in which the Court rejected a § 1983 claim brought by commercial fishermen seeking to enforce federal laws restricting water pollution.<sup>165</sup> It held that the "comprehensive enforcement mechanisms" in these statutes demonstrated Congress's intent to preclude a § 1983 right of action.<sup>166</sup> Specifically, the environmental statutes in question allowed for citizen suits, administrative remedies, and federal agency enforcement. The Court concluded that these "unusually elaborate enforcement provisions" demonstrated congressional intent to supplant a § 1983 remedy.<sup>167</sup> On the other hand, in *Wright v. City of Roanoke Redevelopment and Housing Authority*,<sup>168</sup> the Court rejected the argument that relief under a federal housing law was impliedly precluded by an administrative enforcement scheme.<sup>169</sup> Although the U.S. Department of Housing and Urban Development had some authority to enforce the statute, the remedies expressly provided were not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action."<sup>170</sup>

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159. *Thiboutot*, 448 U.S. at 5.

160. *Id.* at 4.

161. *Id.* at 11 (Powell, J., dissenting).

162. *Id.* at 16.

163. *Id.* at 23.

164. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 562-70 (5th ed. 2007).

165. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981).

166. *Id.* at 20.

167. *Id.* at 13, 21; see also *Smith v. Robinson*, 468 U.S. 992, 1003-04 (1984) (finding implied preclusion of a § 1983 claim under the Education of the Handicapped Act).

168. 479 U.S. 418 (1987).

169. *Id.* at 424.

170. *Id.* at 425; see also *Blessing v. Freestone*, 520 U.S. 329, 348 (1997) (rejecting an argument that an administrative scheme foreclosed § 1983 relief where there was no private judicial or administrative remedy).

*Wright* says that congressional intent to preclude must be clear—the reverse of the presumption that now exists for *implied* rights of action—for a § 1983 claim to be foreclosed by an alternative enforcement scheme.<sup>171</sup> More recently, however, the Court has held that preclusion will be presumed where the statute includes its own private remedy. In *City of Rancho Palos Verdes v. Abrams*,<sup>172</sup> an amateur radio operator sought to sue the municipality in which he lived under § 1983, claiming that it had violated various provisions of the Telecommunications Act of 1996.<sup>173</sup> Justice Scalia’s opinion for the Court rejected plaintiff’s § 1983 claim, reasoning that a statute’s “provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983.”<sup>174</sup> This suggests that a statute’s inclusion of private remedy will ordinarily be presumed to foreclose a § 1983 claim. Because the Telecommunications Act provided remedies to private parties, and because plaintiff failed to counter the presumption against a § 1983 claim, the Court concluded that this claim was impliedly precluded.<sup>175</sup> By contrast, an administrative procedure providing only for the withdrawal of federal funding—and not for a private remedy—is insufficient to preclude a § 1983 claim.<sup>176</sup>

The other major limitation on using § 1983 to enforce a federal statute is the requirement that the statute confer rights. This requirement is drawn from the language of § 1983 itself, which states that plaintiffs deprived of “rights, privileges, or immunities” secured by federal law may obtain redress.<sup>177</sup> Over time, this requirement too has become more stringent, with the current Court requiring an unambiguous conferral of an individual right to make a § 1983 claim under a federal statute. The Court first carved out this limitation in *Pennhurst State School and Hospital v. Halderman*,<sup>178</sup> decided just one year after *Thiboudot*. Justice Rehnquist’s opinion for the Court concluded that the statute in question, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, declared policy but did not create substantive rights.<sup>179</sup> In *Golden State Transit Corp. v. City of Los Angeles*, the Court held that a private plaintiff may sue under § 1983 if a three-part test is satisfied: (1) the federal statute creates a binding obligation; (2) the interest is sufficiently specific as to be judicially

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171. *Wright*, 479 U.S. at 425.

172. 544 U.S. 113 (2005).

173. *Id.* at 116-18.

174. *Id.* at 121.

175. *Id.* at 122.

176. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795-96 (2009).

177. 42 U.S.C. § 1983 (2006).

178. 451 U.S. 1 (1981).

179. *Id.* at 22. The *Pennhurst* Court relied in part on the fact that the federal statute in question was enacted pursuant to Congress’s spending power, and that the remedy for failure to comply with such statutes is usually termination of funds. *Id.* at 28.

enforceable; and (3) the statute is designed to benefit the plaintiff.<sup>180</sup> Subsequent cases, however, have tightened this test by clarifying that the federal statute must do more than impose a duty on state or local officials.<sup>181</sup> There must instead be an intent to confer a specific right on individuals.<sup>182</sup>

The Court's most emphatic insistence that federal law must confer an individual right appears in *Gonzaga University v. Doe*.<sup>183</sup> The plaintiff was a former student at Gonzaga University who alleged that the school had released information in violation of the Family Educational Rights and Privacy Act (FERPA).<sup>184</sup> In rejecting his claim, the Court reviewed its prior cases holding that laws imposing a specific, binding obligation on states were sufficient to allow § 1983 relief.<sup>185</sup> While acknowledging that some language in these cases suggested a more generous standard, the *Gonzaga* majority expressly “reject[ed] the notion that . . . anything short of an unambiguously conferred right” suffices to support a § 1983 right of action.<sup>186</sup> The Court also clarified that only an “individual right” will suffice.<sup>187</sup> Once plaintiff establishes that the statute unambiguously confers an individual right, the burden shifts to the state or local defendant to show that Congress intended to foreclose a § 1983 remedy.<sup>188</sup> In this respect, the inquiry differs from that which now applies to implied rights of action, under which plaintiff has the burden of demonstrating congressional intent to create both a private right *and* a private remedy.<sup>189</sup> But the first part of the inquiry—whether Congress intended to create an individual right—is now the same for both implied and § 1983 rights of action.<sup>190</sup> Because FERPA’s

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180. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989); *see also Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 510-11 (1990) (finding a § 1983 right of action where a statute created a “binding obligation”); Mazzuchi, *supra* note 125, at 1095-96 (understanding *Wilder* to mean that § 1983 creates a presumption of private enforceability where a right exists under the *Cort* test).

181. *See Key*, *supra* note 92, at 346-52 (describing and criticizing the Court’s approach to rights of action under § 1983 for federal statutory violations).

182. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 344-45 (1997) (rejecting a § 1983 claim for violation of provisions of Title IV-D of the Social Security Act requiring states to provide child support services on the ground that they did not “give rise to individualized rights”); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (rejecting § 1983 claim for alleged violation of Adoption Assistance and Child Welfare Act of 1980, which imposed a “generalized duty on the State,” but did not “unambiguously confer an enforceable right upon the Act’s beneficiaries”).

183. 536 U.S. 273 (2002).

184. *Id.* at 277.

185. *Id.* at 279-82.

186. *Id.* at 283.

187. *Id.* at 284.

188. *Id.* at 284, 284 n.4.

189. *Id.* at 284.

190. *Id.* at 285 (“A court’s role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied rights of action context. . . . Both inquiries simply require a determination as to whether

nondisclosure provisions lacked clear and unambiguous “rights-creating” language, the Court found there to be no § 1983 right of action to enforce them.<sup>191</sup>

*Gonzaga* thus imposed the most restrictive test to date on plaintiffs seeking relief under § 1983 for violations of a federal statute. There may be some basis for limiting its impact in the future, given that the majority spends much of its opinion emphasizing that FERPA and other statutes considered in earlier § 1983 cases were enacted pursuant to Congress’s Spending Clause authority.<sup>192</sup> Where Congress acts pursuant to this power, the “typical remedy” for a violation is termination of federal funds.<sup>193</sup> If *Gonzaga*’s demanding test were limited to statutes enacted under Congress’s spending power, then its rationale resembles the preclusion reasoning articulated in cases like *Sea Clammers*<sup>194</sup> and *Abrams*.<sup>195</sup> On this theory, the restrictive test for finding a § 1983 right of action is predicated on the availability of an alternative remedy—namely, cutting off federal funds—that is presumed to preclude a private claim.

The problem with this argument is that *Gonzaga*’s language requiring an “unambiguously conferred right” is not expressly limited to Spending Clause cases. This suggests that the Court intended that the same restrictive test for a § 1983 right of action apply, regardless of the subject matter of the dispute and the source of constitutional authority for the statute in question.<sup>196</sup> So interpreted, *Gonzaga* represents a major impediment to private plaintiffs seeking redress for federal statutory violations committed by state or local actors—including actions under federal election statutes. Like all the previous § 1983 right-of-action cases decided by the Supreme Court, *Gonzaga* did not involve an election dispute. Its language is nevertheless broad enough to encompass such disputes.

### III. PRIVATE ENFORCEMENT OF FEDERAL ELECTION STATUTES

The Court’s restrictive doctrine on private rights of action has mostly developed outside the context of elections. In fact, prior to *Brunner v. Ohio*

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or not Congress intended to confer individual rights upon a class of beneficiaries.”); *see also* Mank, *supra* note 102, at 1448 (“Chief Justice Rehnquist significantly changed the test [in *Gonzaga*] . . . by emphasizing that the same issue of congressional intent controls as in implied right of action cases.”).

191. *Gonzaga*, 536 U.S. at 287. In dissent, Justice Stevens protested the majority’s partial conflation of the tests for implied and § 1983 rights of action, on the ground that § 1983 claims do not implicate the same separation-of-powers concerns. *Id.* at 300 (Stevens, J., dissenting).

192. *Id.* at 278-81.

193. *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

194. *See supra* notes 165-67.

195. *See supra* notes 172-75.

196. *See Key, supra* note 92, at 324 (describing the result of the Court’s jurisprudence as “eliminat[ion] of the practical utility of § 1983 statutory causes of action, while ostensibly still recognizing their existence”).

*Republican Party*,<sup>197</sup> none of the Court's decisions on § 1983 rights-of-action involved election law disputes. This is partly because some of the most important federal election statutes—including § 2 of the Voting Rights Act<sup>198</sup> and the National Voter Registration Act<sup>199</sup>—are privately enforceable. In fact, the prominence of these statutes is at least partly attributable to the availability of a private right of action to enforce them.

It is unclear whether other election statutes are privately enforceable, and there have been several recent cases in which lower courts have applied the Court's right-of-action jurisprudence to claims that federal election statutes had been violated. This section canvasses lower court cases brought to remedy alleged violations of three statutes: (1) the voter qualification and registration requirements codified in 42 U.S.C. § 1971; (2) UOCAVA; and (3) HAVA. I then turn to the *Brunner* litigation, explaining why the underlying question was more complex than the Court's brief opinion might lead one to believe. This part of the Article is mainly focused on the application of existing private-right-of-action doctrine, leaving a critique of that doctrine for Part IV.

#### A. Section 1971

The federal election statute that has led to the most opinions over private rights of action is 42 U.S.C. § 1971. This is somewhat ironic, given the relative obscurity of this provision, but not entirely surprising. As described below, most courts to have addressed the issue have concluded that this statute is not privately enforceable. The statute's obscurity is partly attributable to the courts' general refusal to imply a private right of action.

The voter qualification and registration requirements codified in § 1971 have their origins in a voting rights statute enacted in 1870, one year before § 1983. Through § 1971, Congress exercised its power to enforce the newly enacted Fifteenth Amendment by prohibiting state and local entities from denying the vote based on race, color, or previous condition of servitude.<sup>200</sup> Section 1971 was amended as part of the Civil Rights Act of 1957 to prohibit the intimidation and coercion of voters and to allow for enforcement by the U.S. Attorney

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197. 129 S. Ct. 5 (2008) (per curiam).

198. 42 U.S.C. § 1973 (2006). Interestingly, § 2 does not expressly confer a right of action, though the Supreme Court has routinely allowed private enforcement of this provision. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991). Commentators have likewise stated that § 2 provides a private right of action, with little or no explanation of why. See Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 732 (2006). In one of the few cases to address the question expressly, which was decided shortly after the VRA's enactment, a federal district court concluded that § 2 was enforceable through § 1983. *Gray v. Main*, 291 F. Supp. 998, 999-1000 (M.D. Ala. 1966).

199. 42 U.S.C. §§ 1973gg-1973gg-10.

200. *Id.* § 1983.

General.<sup>201</sup> Congress amended § 1971 again as part of the Civil Rights Act of 1960, enhancing the federal courts' remedial powers in cases where a "pattern or practice" of violations was found to exist.<sup>202</sup>

The most significant amendment, for purposes of private enforceability, was the addition of requirements pertaining to voter qualifications and registration as part of the Civil Rights Act of 1964.<sup>203</sup> These amendments, now codified at 42 U.S.C. § 1971(a)(2), include two key components. First, with respect to voter qualifications, the statute prohibited the application of a "standard, practice, or procedure" to some voters that was different from that applied to other voters in the same jurisdiction.<sup>204</sup> Second, the statute prohibited the denial of the right to vote based on an "error or omission on any record or paper relating to any application, registration, or other act requisite to voting," unless the error or omission was "material in determining whether such individual is qualified . . . to vote."<sup>205</sup> By their terms, these requirements are not limited to race discrimination, and some courts have held that they apply to discrimination on other grounds, including sex or student status.<sup>206</sup>

The 1957, 1960, and 1964 civil rights acts are generally viewed as having been ineffective in protecting voting rights, because they depended mainly on litigation for enforcement. Southern federal district judges were often unwilling to intercede, and even when they did, new disenfranchising practices were often adopted right after the old ones had been stopped.<sup>207</sup> The 1964 amendments to § 1971 might well have assumed greater importance, however, had Congress not enacted the VRA the next year.<sup>208</sup> The VRA effectively overwhelmed the system of disenfranchisement that had kept Southern blacks from voting since the end

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201. *Id.* § 1971(g).

202. *Id.* § 1971(e).

203. Pub. L. 88-352, § 101, 78 Stat. 241 (1964).

204. 42 U.S.C. § 1971(a)(2)(A).

205. *Id.* § 1971(a)(2)(B). The 1964 amendment also added a prohibition on literacy tests, unless administered wholly in writing with the questions. *Id.* § 1971(a)(2)(C). This change was effectively supplanted by the temporary ban on literacy tests in covered jurisdictions (made permanent in 1975) in § 4 of the Voting Rights Act of 1965. *Id.* § 1973(b). BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 21 (1992); Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1984).

206. See *Ball v. Brown*, 450 F. Supp. 4, 7-8 (N.D. Ohio. 1977) (concluding that § 1971 reaches sex discrimination); *Frazier v. Callicutt*, 383 F. Supp. 15, 19-20 (N.D. Miss. 1974) (concluding that § 1971(a)(2)(A) reaches discrimination against students). But see *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839-40 (S.D. Ind. 2006) (questioning plaintiffs' argument that § 1971(a)(2) reaches non-racial discrimination, but then assuming that it does and finding no violation), *aff'd on other grounds sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

207. Tokaji, *The New Vote Denial*, *supra* note 110, at 702.

208. Pub. L. No. 89-110, 79 Stat 457 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

of Reconstruction.<sup>209</sup> Because the VRA was so effective in enfranchising Southern blacks,<sup>210</sup> § 1971's requirements—and with it the question of whether the statute is privately enforceable—receded in significance.<sup>211</sup>

There have, however, been several cases in which private plaintiffs have sought to enforce the qualification and registration requirements of § 1971.<sup>212</sup> The Supreme Court has never confronted the issue directly, although it did assume private enforceability in *United States v. Mississippi*, stating that “private persons might file suits under § 1971 against individual registrars who discriminated in applying otherwise valid laws.”<sup>213</sup> Because that case was brought by the U.S. government rather than private plaintiffs, it is dictum that has been given scant weight by subsequent courts.

There is a split of authority in the lower courts on the question of § 1971's private enforceability, with most rejecting the argument that there is a private right of action. But in all of the cases rejecting a private right of action, the analysis is brief, conclusory, and unsatisfying.<sup>214</sup> Based on § 1971's express provision for enforcement by the Attorney General,<sup>215</sup> these courts concluded that private enforcement is precluded. Without exception, the decisions fail to apply the tests established by the Supreme Court, either for an implied right of action or for a § 1983 right of action.

The most thorough analysis of the issue appears in the one appellate decision

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209. Tokaji, *The New Vote Denial*, *supra* note 110, at 702.

210. *Id.*; see also GROFMAN ET AL., *supra* note 205, at 23 tbl.1 (showing increase in black registration in covered states from 29.3% to 52.1% between 1965 and 1967).

211. The VRA included an amendment to § 1971, extending it from federal elections to all elections. Pub. L. No. 89-110, § 15, 79 Stat. 37, 445 (codified as amended at 42 U.S.C. § 1971 (2006)).

212. One of those cases was the challenge to Indiana's photo identification law, which ultimately led to the Supreme Court's decision upholding its constitutionality. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). The district court in that case rejected plaintiffs' § 1971 claim on the merits without deciding whether there was a private right of action to enforce the statute. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 842 n.112 (S.D. Ind. 2006), *aff'd on other grounds sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), and neither the Seventh Circuit nor the Supreme Court addressed § 1971. *Crawford*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

213. 380 U.S. 128, 137 (1965).

214. See, e.g., *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998), *aff'd sub nom. Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999); *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, at \*2 (E.D. La. Oct. 31, 1996); *Cartagena v. Crew*, No. CV-96-3399, 1996 WL 524394, at \*3 n.8 (E.D.N.Y. Sept. 5, 1996); *Willing v. Lake Orion Cnty. Sch. Bd. of Trs.*, 924 F. Supp. 2d 815, 820 (E.D. Mich. 1996); *Good v. Roy*, 459 F. Supp. 403, 405 (D. Kan. 1978); see also *Broyles v. Texas*, 618 F. Supp. 2d 661, 697 n.11 (S.D. Tex. 2009) (citing cases that have found no private right of action to enforce § 1971, but disposing of case on other grounds), *aff'd*, No. 09-20290, 2010 WL 2465093 (5th Cir. June 11, 2010).

215. 42 U.S.C. § 1971(c) (2006).

expressly holding that there is a private right of action to enforce § 1971. In *Schwier v. Cox*,<sup>216</sup> the Eleventh Circuit considered a challenge to Georgia's law requiring that voters furnish their Social Security numbers.<sup>217</sup> The court canvassed the history of § 1971, noting that the provisions for Attorney General enforcement were not added until 1957, thus suggesting that—at least from the enactment of § 1983 in 1871 until 1957—§ 1971 was enforceable by private plaintiffs.<sup>218</sup> The court also relied in part on Supreme Court precedent holding that portions of the VRA are privately enforceable, despite the fact that they may also be enforced by the Attorney General.<sup>219</sup> In other words, the express provision for enforcement by the federal government does not necessarily preclude private enforcement. The Eleventh Circuit then turned to the test for whether there is a private right of action under § 1983, finding that § 1971 includes precisely the sort of clear, rights-creating language that the *Gonzaga* Court demanded.<sup>220</sup> Accordingly, the *Schwier* court found the requirements of § 1971 to be privately enforceable.<sup>221</sup>

Despite the fact that most other courts have disagreed, the Eleventh Circuit's conclusion that § 1971 is privately enforceable is correct, even under the stringent test that the *Gonzaga* Court set forth for private rights of action under § 1983. The lower courts that have reached the opposite conclusion have simply failed to apply the Court's test.

There is an additional factor, not mentioned in *Schwier* or formally part of the doctrine, that provides further support for the conclusion that § 1971 should be privately enforceable: the lack of any administrative agency able to provide guidance on the statute's meaning.<sup>222</sup> Although § 1971 has been around for quite

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216. 340 F.3d 1284 (11th Cir. 2003). There are also some district court decisions finding a private right of action to enforce § 1971. See, e.g., *Ball v. Brown*, 450 F. Supp. 4, 7-8 (N.D. Ohio 1977); *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1351-52 (E.D. Pa. 1971). There are also other cases in which the courts have reached the merits of private plaintiffs' § 1971 claims without expressly addressing the issue of whether there is a private right of action. See, e.g., *Ballas v. Symm*, 494 F.2d 1167, 1171-72 (5th Cir. 1974); *Frazier v. Callicutt*, 383 F. Supp. 15, 19-20 (N.D. Miss. 1974); *Brier v. Luger*, 351 F. Supp. 313, 316 (M.D. Pa. 1972); *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968).

217. *Schwier*, 340 F.3d at 1293-94.

218. *Id.* at 1295-97.

219. *Id.* at 1294-96.

220. *Id.* at 1296 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002)).

221. *Id.* at 1297.

222. It might be argued that the Civil Rights Act of 1964, which added the qualification and registration provisions codified at § 1971(a)(2), conferred this authority on the U.S. Commission on Civil Rights (USCCR). 42 U.S.C. § 1971(a)(2) (2006). Specifically, § 507 of the 1964 Act gave the USCCR broad power to make such rules and regulations as are necessary to carry out the purposes of the Act. Pub. L. No. 88-352, § 507, 78 Stat. 241, 252 (1964). The United States Commission on Civil Rights Act of 1983, which made the USCCR an independent agency, included the same language—although the reference to “this Act” is best understood as referring only to the 1983 Act (rather than to § 1971(a)(2) or other provisions added by the Civil Rights Act of 1964).

a while, there is relatively little precedent on precisely what practices are barred by its provisions, particularly the qualification and registration provisions of § 1971 (a)(2). Without any agency empowered to issue regulations that would clarify the scope of § 1971, the courts are the only entity in a position to provide authoritative guidance. But without a private right of action, the only way of getting disputes into court would be for the Attorney General to bring suit. Even putting aside the dangers of giving exclusive enforcement authority to the Department of Justice (a concern to which I will return in Part IV),<sup>223</sup> the lack of a private right of action would limit—and no doubt has limited—the ability of courts to clarify the meaning of § 1971. Although this is not something that the Supreme Court has recognized to be relevant in assessing whether there is an implied or § 1983 right of action, the ability of courts to clarify the law would be a significant benefit of private enforceability. For without a private right of action, the only cases that can be heard in a federal court are the ones that the U.S. government brings. If the Department of Justice declines to bring litigation under § 1971 (or, for that matter, any other federal election statute), then its meaning will remain indeterminate for both the voters it protects and the election officials who are required to follow it.

### B. UOCAVA

Another election statute that lacks an express private right of action is the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>224</sup> This statute has generated even less litigation than § 1971, and so far, no decisions have expressly held whether there is an implied or § 1983 right of action to enforce the statute.<sup>225</sup>

UOCAVA has its origins in the Federal Voting Assistance Act of 1955,<sup>226</sup> which was designed to allow members of the armed services and their families to vote absentee when stationed overseas,<sup>227</sup> and the Overseas Citizens Voting Rights Act of 1975,<sup>228</sup> which extended absentee voting to other citizens residing

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42 U.S.C. § 1975b(d). In any event, the USCCR functions as an investigatory rather than regulatory agency. See Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1782 (1985) (characterizing USCCR as a “purely investigatory agency”). Throughout its history, the USCCR has apparently understood its rulemaking authority as limited to its internal operations, and not to include the interpretation of substantive provisions of civil rights law such as § 1971.

223. See *infra* Part IV.

224. 42 U.S.C. §§ 1973ff-1973ff-6 (2006).

225. For a summary of litigation involving UOCAVA, see Deborah Buckman, *Validity, Construction, and Application of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*, 42 U.S.C.A. §§ 1973ff *et seq.*, 1 A.L.R. FED. 2d 251 (2005).

226. 42 U.S.C. §§ 1973cc-1973cc-3, repealed by UOCAVA, Pub. L. No. 99-410, § 203, 100 Stat. 924.

227. *Id.*

228. 42 U.S.C. §§ 1973dd-1973dd-5, repealed by UOCAVA, Pub. L. No. 99-410, § 203, 100

outside the United States.<sup>229</sup> In 1986, Congress repealed these statutes and enacted UOCAVA in their place, out of a recognition that overseas voters still faced serious obstacles to voting absentee and having their votes counted.<sup>230</sup> Broadly speaking, UOCAVA requires states to allow uniformed and overseas voters to use absentee voter procedures.<sup>231</sup> UOCAVA also prescribes a process by which voters who request but do not receive their absentee ballots in time may cast a federal write-in ballot,<sup>232</sup> and it includes a number of “recommended” steps that states can take to facilitate voting by uniformed and overseas voters.<sup>233</sup> This leaves many of the details to be worked out by individual states.<sup>234</sup> The U.S. Attorney General has the power to enforce UOCAVA through actions for declaratory or injunctive relief, but the act is silent on private enforceability.<sup>235</sup> The Department of Justice’s website reports there were thirty-five lawsuits to enforce UOCAVA between 1986 and 2009.<sup>236</sup>

In 2009, Congress strengthened UOCAVA through the Military and Overseas Voter Empowerment (MOVE) Act.<sup>237</sup> Finding that military and overseas voters still faced a “complicated and convoluted system,”<sup>238</sup> the MOVE Act imposed more specific requirements on the states. Among these requirements are: (1) to allow the electronic transmission of registration materials, ballot requests, and blank ballots, (2) to give covered voters forty-five days to complete and return their absentee ballots, (3) to create a system for determining whether voters’ ballots have been received, (4) to ensure the privacy of military and overseas voters, and (5) to prohibit states from rejecting registration or ballot requests for lack of notarization or other formalities.<sup>239</sup> It also gives a presidential designee (now the Secretary of Defense) various responsibilities, such as the establishment of procedures for delivery of ballots and an outreach program for voters covered by the Act.<sup>240</sup>

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Stat. 924.

229. *Id.*

230. H.R. REP. NO. 99-765, at 10 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2014.

231. 42 U.S.C. § 1973ff-1 (2006).

232. *Id.* § 1973ff-2.

233. *Id.* § 1974ff-3.

234. See *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1314 (N.D. Fla. 2000).

235. 42 U.S.C. § 1973ff-4.

236. *Voting Section Litigation*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/voting/litigation/caselist.php#uocava\\_cases](http://www.justice.gov/crt/voting/litigation/caselist.php#uocava_cases) (last visited Sept. 29, 2010).

237. Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, § 574-89, 123 Stat. 2190 (codified at 42 U.S.C. §§ 1973ff to 1973ff-2 (2006)).

238. 155 CONG. REC. S10682 (daily ed. Oct. 22, 2009) (statement of Sen. Charles Schumer).

239. 42 U.S.C. § 1973ff-1(a).

240. *Id.* § 1973ff-2A. The Secretary of Defense has delegated its responsibilities under UOCAVA, as amended by MOVE, to the Federal Voting Assistance Program. FEDERAL VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/> (last updated Sept. 24, 2010); *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/voting/litigation/caselist.php#uocava\\_cases](http://www.justice.gov/crt/voting/litigation/caselist.php#uocava_cases).

There are very few reported decisions involving UOCAVA,<sup>241</sup> although that may change with the imposition of new responsibilities on the states through the MOVE Act. Of those decisions, none expressly addressed whether UOCAVA is privately enforceable. One of the most prominent UOCAVA cases was brought by George W. Bush, Dick Cheney, and the Florida Republican Party during the dispute over the outcome of Florida's 2000 presidential contest. In *Bush v. Hillsborough County Canvassing Board*,<sup>242</sup> the plaintiffs challenged various Florida counties' refusal to accept ballots from overseas and military voters that were unpostmarked, had illegible postmarks, or were postmarked after election day.<sup>243</sup> Without addressing whether the private plaintiffs were entitled to enforce UOCAVA, the court found that some of the counties' practices violated the MOVE Act and granted declaratory relief.<sup>244</sup> The failure to discuss the private right of action issue is surprising, given that candidates Bush and Cheney were plaintiffs in the case.<sup>245</sup> While individual voters who are denied relief might well meet the standard for implied or § 1983 rights of action,<sup>246</sup> it is difficult to imagine how a candidate could do so. Perhaps the inclusion of the Florida Republican Party—which undoubtedly included members whose rights under UOCAVA were allegedly violated—made it unnecessary, in the view of the court and the litigants, to consider whether candidates Bush and Cheney had a right of action.<sup>247</sup>

The question whether there is a private right of action to enforce UOCAVA did arise in *United States v. Cunningham*, a case challenging Virginia officials' alleged failure to comply with the statute, brought the day before the 2008

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gov/crt/voting/misc/activ\_uoc.php (last visited Sept. 29, 2010).

241. For a description of those few cases, see Buckman, *supra* note 225. A few of those cases involve challenges to UOCAVA's constitutionality—all of them unsuccessful. *See, e.g.*, Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); Igartua de la Rosa v. United States, 107 F. Supp. 2d 140 (D.P.R. 2000); Howard v. State Admin. Bd. of Election Laws, 976 F. Supp. 350 (D. Md. 1996), *aff'd*, 122 F.3d 1061 (4th Cir. 1997). Others involve cases in which compliance with UOCAVA was asserted as a defense to a claim under another law. *See, e.g.*, Casarez v. Val Verde Cnty., 957 F. Supp. 847 (W.D. Tex. 1997); N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J. 2002).

242. 123 F. Supp. 2d 1305 (N.D. Fla. 2000).

243. *Id.* at 1306.

244. *Id.* at 1317.

245. *Id.* at 1306.

246. My research has located only one other decision, an unreported one, in which voters were allowed to assert claims under UOCAVA. *See Reitz v. Rendell*, No. 104-CV-2360, 2004 WL 2451454 (M.D. Pa. Oct. 29, 2004). As in *Hillsborough County*, there was no discussion of the private right of action issue. *Id.*

247. There is also a question of whether plaintiffs in this case had standing. For a discussion of a similar question in the *Bush v. Gore* litigation, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1097-1102 (2001) (arguing that Bush lacked standing). *But see* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2491-92 (2003) (suggesting a rationale for the assumption that Bush had standing to raise the claims of voters).

presidential election.<sup>248</sup> As originally filed, the only plaintiff was the campaign committee for the Republican presidential ticket.<sup>249</sup> For the same reason that Bush and Cheney lacked a right of action in 2000, it is highly questionable that the McCain-Palin campaign had a private right of action to enforce UOCAVA—even assuming that a right of action would lie on behalf of voters whose rights were denied by Virginia’s failure to comply with the statute. In their motion to dismiss, defendants argued that UOCAVA did not create privately enforceable rights and that the express provision for Attorney General enforcement should be understood to preclude private enforcement.<sup>250</sup> Before that motion was adjudicated, the United States government intervened in the case on the side of plaintiff. The district court subsequently granted the United States’ motion to intervene and dismissed the McCain-Palin campaign as a plaintiff without expressly stating its reasons.<sup>251</sup>

A close look at UOCAVA reveals that the question of the statute’s private enforceability is a murky one. Contrary to the argument made by the state defendants in *Cunningham*, the fact that the statute expressly provides for Attorney General enforcement does not necessarily foreclose a private right of action. Although lower federal courts have accepted a similar argument in denying a right of action under § 1971, that is flatly inconsistent with the Supreme Court’s tests for rights of action. Nor do the implementation responsibilities given to the Secretary of Defense under UOCAVA, as amended by MOVE, amount to a comprehensive enforcement scheme sufficient to preclude private enforcement. That said, the current doctrine probably would not permit implication of a right of action directly under UOCAVA, as there appears to be no evidence that Congress—either in 1986 or when it amended the statute in 2009—intended any of its requirements to be privately enforceable.

There is a much stronger argument that certain provisions of UOCAVA are privately enforceable under § 1983, although the matter is hardly free from doubt. Recall that, under the line of cases culminating with *Gonzaga*, private plaintiffs must show that Congress intended to create an individual right (though not necessarily a private remedy) in order to sue under § 1983 for violation of a federal statute. Several provisions of UOCAVA are best understood as

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248. United States v. Cunningham, No. 3:08CV709, 2009 WL 335028, at \*1 (E.D. Va. Oct. 15, 2009). The case was originally filed as *McCain-Palin 2008, Inc. v. Cunningham*, but changed to *United States v. Cunningham*, after the United States intervened as a plaintiff. See *infra* notes 249-51.

249. Complaint, *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08CV709 (E.D. Va. Nov. 3, 2008), available at <http://moritzlawosu.edu/electionlaw/litigation/documents/McCain-Complaint-11-3-08.pdf>.

250. Memorandum in Support of Motion to Dismiss, *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08CV709 (E.D. Va. Nov. 6, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/McCain-Memo1-11-6-08.pdf>.

251. Order at 1-2, *McCain-Palin, 2008, Inc. v. Cunningham*, No. 3:08cv709 (E.D. Va. Nov. 17, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/McCain-order-11-17-08.pdf>.

conferring an individual right against state officials. Among them are the requirements that states:

- “permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot” in federal elections,<sup>252</sup>
- “accept and process . . . any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter” if received not less than thirty days before a federal election,<sup>253</sup>
- “permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots” in federal elections,
- “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election,” so long as the request is received before then,<sup>254</sup> and
- establish procedures that “shall ensure that the privacy of the identity and other personal data” of uniformed and overseas voters is protected.<sup>255</sup>

The conclusion that these and similarly worded provisions of UOCAVA are privately enforceable is strengthened by language in the statute confirming that Congress thought it was conferring rights on uniformed and overseas voters: “The exercise of any *right* under this subchapter shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising such *right*.<sup>256</sup> This makes it quite clear and unambiguous that at least some provisions of UOCAVA confer rights. Under *Gonzaga*, the existence of rights-creating language creates a presumption of § 1983 enforceability and, given the absence of a “comprehensive enforcement scheme that is incompatible with individual enforcement,”<sup>257</sup> it is unlikely that the state can rebut that presumption. On the other hand, other provisions of UOCAVA appear to lack the sort of rights-creating language that *Gonzaga* demands. For example, UOCAVA’s requirements that states “establish procedures” for transmitting absentee ballots<sup>258</sup> and report data on ballots transmitted<sup>259</sup> do not appear to confer a right upon any individual—much less do so “unambiguous[ly]” as *Gonzaga*’s test demands—even though these requirements are undoubtedly designed to benefit uniformed and overseas voters.

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252. 42 U.S.C. § 1973ff-1(a)(1) (2006).

253. *Id.* § 1973ff-1(a)(2).

254. *Id.* § 1973ff-1(a)(8).

255. *Id.* § 1973ff-1(e)(6)(B).

256. *Id.* § 1973ff-5 (emphasis added).

257. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

258. 42 U.S.C. § 1973ff-1(a)(7).

259. *Id.* § 1973ff-1(a)(11).

### C. HAVA

The most prominent area of election law in which the private-right-of-action question has arisen is the enforcement of HAVA. Passed in the wake of the 2000 election meltdown, HAVA imposes modest but important requirements on states.<sup>260</sup> As a general matter, HAVA's requirements attempt to promote the sometimes competing goals of access and integrity or, as one of the bill's co-sponsors put it, making it both "easier to vote" and "harder to cheat."<sup>261</sup> These requirements can be broken down into four categories:

1. *Voting Technology*—HAVA did not require the replacement of the punch-card voting technology that proved so troublesome in 2000. In fact, it specifically declined to require jurisdictions to replace their existing equipment.<sup>262</sup> HAVA does, however, impose some basic requirements that all voting equipment must meet. Among the requirements are that voting systems allow voters to correct errors before casting their ballots, that equipment produce an auditable record, that they be accessible to people with disabilities, and that they provide alternate language accessibility.<sup>263</sup>

2. *Statewide Registration Lists*—Before HAVA's enactment, registration lists were kept at the local level (typically the county or municipal level) in most states.<sup>264</sup> HAVA changed this by requiring every state that requires voter registration to have "a single, uniform, official, centralized, interactive computerized statewide voter registration list."<sup>265</sup> This list, sometimes referred to as a "statewide registration database," must contain the name and registration information of every legally registered voter in the state. HAVA contains some specific requirements for the maintenance of these lists, including requirements that "duplicate names are eliminated" and that "only voters who are not registered or who are not eligible to vote are removed."<sup>266</sup> It also requires that state chief election officials enter into agreements with state motor vehicle authorities to "match" voter registration information against motor vehicle records, to the extent required to verify the accuracy of information on voter registration applications.<sup>267</sup>

3. *Voter Identification*—Among the most controversial topics to have emerged in the years since 2000 is whether and how voters should be required to prove their identity in order to have their votes counted. HAVA imposed a limited identification requirement, applicable only to certain voters—specifically,

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260. *Id.* §§ 15301-15545 (2006 & Supp. 2008).

261. David Nather, *Election Overhaul May Have to Wait in Line Behind Other 'Crisis' Issues*, CQ WKLY., July 27, 2002, at 2034 (quoting Rep. Steny Hoyer).

262. 42 U.S.C. § 15481(c)(1).

263. *Id.* §§ 15481(a)(1)-(4).

264. Tokaji, *Voter Registration and Election Reform*, *supra* note 32, at 471.

265. 42 U.S.C. § 15483(a)(1)(A).

266. *Id.* §§ 15483(a)(2)(B)(ii)-(iii).

267. *Id.* § 15483(a)(5)(B)(i).

to first-time voters who register by mail.<sup>268</sup> Those voters are required to produce identifying information, though it need not be in the form of photo identification such as a driver's license. Other acceptable forms of identification include utility bills, bank statements, government checks, paychecks, or government documents with the voter's name and address.<sup>269</sup>

4. *Provisional Voting*—Finally, HAVA requires that voters be permitted to cast a provisional ballot if their names do not appear on the registration list or if they lack required identification.<sup>270</sup> To cast a provisional ballot, the voter must affirm that he or she is “a registered voter in the” jurisdiction and “eligible to vote in that election.”<sup>271</sup> The voter’s ballot must then be counted, if he or she is determined eligible under state law.<sup>272</sup> HAVA also prescribes, in general terms, the process that election officials are supposed to follow in notifying voters that they may cast a provisional ballot, permitting them to cast such ballot, transmitting provisional ballots for verification, determining whether to count the ballot, and creating a procedure for notifying voters whether their ballot has been counted.<sup>273</sup>

HAVA is silent on whether any of its requirements are privately enforceable. If we take seriously *Alexander*’s statement that an implied right of action requires evidence of a congressional intent to create one in the statute itself,<sup>274</sup> it is hard to see how this standard could be met. A more difficult question is whether HAVA, or at least some of its requirements, may be enforced under § 1983. HAVA expressly allows the U.S. Attorney General to bring suit for declaratory or injunctive relief,<sup>275</sup> though this is not dispositive of whether there is a § 1983 right of action.<sup>276</sup> HAVA also requires an administrative complaint procedure for those who believe that there has been a violation of the statute.<sup>277</sup> This, however, falls well short of the comprehensive remedial scheme that might be deemed to demonstrate a congressional intent to foreclose a private judicial remedy.<sup>278</sup> Under the HAVA-required administrative complaint process, states are required to have a process for receiving complaints but have unreviewable discretion to dismiss complaints if they find no violation, without any provision for judicial review.<sup>279</sup> Even in cases where they find a violation, it is up to states to determine the “appropriate remedy,” again without any provision for judicial

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268. *Id.* § 15483(b)(1).

269. *Id.* § 15483(b)(2)(A)(i)(II).

270. *Id.* § 15482(b)(2)(A)(i)(b)(2)(B).

271. *Id.* § 15483(a)(2).

272. *Id.* § 15483(a)(4).

273. *Id.* §§ 15483(a)(1)-(4).

274. See *supra* notes 144-48.

275. 42 U.S.C. § 15511.

276. See *supra* Parts II.A. & II.B.

277. 42 U.S.C. § 15512.

278. See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005); *Middlesex Cnty. Sewerage Auth. v. Nat'l Seal Clammers Ass'n*, 453 U.S. 1, 13 (1981).

279. 42 U.S.C. § 15512(a)(2)(G).

review.<sup>280</sup> This is a far cry from the sort of “comprehensive enforcement mechanism[]”<sup>281</sup> that the Court has required to foreclose a right of action under § 1983.<sup>282</sup>

The legislative history of HAVA is also of little help in determining whether its requirements may be privately enforced. There is only one statement from the floor debate expressly addressing the subject.<sup>283</sup> In commenting on the Conference Report on the bill, Senator Chris Dodd, one of HAVA’s co-sponsors, stated that he “would have preferred that we extend the private right of action afforded private parties under [the National Voter Registration Act],” but that the House (at that time controlled by Republicans) “simply would not entertain such an enforcement provisions [sic].”<sup>284</sup> Assuming that this statement is true, it explains why there is no express private right of action in HAVA, but it tells us nothing about whether any provisions of the statute creates rights enforceable under § 1983.

Given that both the statutory text and the legislative history are silent on the private enforceability of HAVA’s obligations under § 1983, it is no surprise that the issue has found its way into court. The question has arisen with respect to three specific requirements of HAVA: (1) that provisional ballots be provided to certain voters; (2) that accessible technology be made available for people with disabilities; and (3) that information in state voter registration databases be matched against other records. What is interesting about these three parts of the statute is that they can be placed at different points along the spectrum in terms of their creating individual rights as required by existing doctrine. The first requirement clearly does create an enforceable right, the second arguably does so, while the third clearly does not do so.

The provision of HAVA that most clearly confers an individual right, thus satisfying *Gonzaga*’s demanding test, is the requirement that certain voters be provided with provisional ballots. In *Sandusky County Democratic Party v. Blackwell*,<sup>285</sup> the Sixth Circuit correctly held that this requirement contains the sort of rights-creating language necessary for private enforceability under § 1983.<sup>286</sup> In that case, a local party organization claimed that Ohio’s secretary of

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280. *Id.* § 15512(a)(2)(F).

281. See *Nat'l Sea Clammers Ass'n*, 453 U.S. at 20.

282. See *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 425 (1987) (refusing to find congressional intent to foreclose § 1983 remedy, where statute lacked a comprehensive and effective private remedy).

283. I base this statement on a Boolean search for (“help america vote” or “election reform”) and (“private right” or “private cause”)” in LexisNexis’s “Congressional Record - 107th Congress” database. The statements by Senator Chris Dodd discussed in the text are the only ones on the topic of private rights of action to enforce HAVA’s requirements.

284. 148 CONG. REC. S10508 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).

285. 387 F.3d 565 (6th Cir. 2004).

286. *Id.* at 572-73. Two district courts have reached the same conclusion on HAVA’s provisional voting requirement. Citing the same language as the Sixth Circuit, the court in *Florida Democratic Party v. Hood* concluded: “The relevant section of HAVA clearly evinces a

state was in violation of HAVA by refusing to issue provisional ballots to or count the ballots of voters appearing at the wrong precinct. After reciting the doctrine articulated in the line of cases extending through *Gonzaga*, the Sixth Circuit turned to the language of HAVA's provisional voting requirement, finding that its "rights-creating language . . . is unambiguous."<sup>287</sup> The court emphasized that HAVA's language refers to an "individual" being permitted to cast a provisional ballot, if he or she complies with certain specific criteria.<sup>288</sup> The statutory text also specifically refers to the "right of an individual to cast a provisional ballot."<sup>289</sup> This language is similar to that contained in Titles VI<sup>290</sup> and IX<sup>291</sup> of the Civil Rights Act, and quite unlike that at issue in *Gonzaga*, which referred not to individuals but instead to programmatic requirements.<sup>292</sup> As the Sixth Circuit's opinion suggests, this is a relatively easy case, even under the stringent test that now exists for private enforcement under § 1983.<sup>293</sup> Congress explicitly conferred an individual right to a provisional ballot on certain voters, and there is no comprehensive remedial scheme that would overcome the presumption that a private right of action lies.

A more difficult question is whether HAVA's disability access mandate is privately enforceable under § 1983. HAVA requires that voting systems be "accessible to individuals with disabilities," specifically mandating that states provide access for visually impaired voters so that they will have the "same opportunity for access and participation (including privacy and independence) as for other voters."<sup>294</sup> Although the statute does not use the word "right," there is no doubt at all about what individuals this requirement is designed to benefit, and the statute even refers to those specific individuals.<sup>295</sup> Is this enough to satisfy *Gonzaga*'s requirement that there be an unambiguously conferred individual right in order to sue under § 1983? There is little precedent on this question, though two district courts have answered the question in the negative.<sup>296</sup>

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congressional intention to create a federal right." 342 F. Supp. 2d 1073, 1078 (N.D. Fla. 2004). The district court in *Bay County Democratic Party v. Land* likewise held that this section contains the "type of unmistakable rights-focused language that the Supreme Court has" required for a § 1983 claim. 347 F. Supp. 2d 404, 426 (E.D. Mich. 2004).

287. *Sandusky Cnty. Democratic Party*, 387 F.3d at 572.

288. *Id.* at 574.

289. *Id.* at 573 (quoting 42 U.S.C. § 15482(b)(2)(E) (2006)) (emphasis omitted).

290. 42 U.S.C. § 2000d (using the language "[n]o person" to confer individual rights).

291. 20 U.S.C. § 1681 (using the language "[n]o person" to confer individual rights).

292. *See supra* notes 183-89.

293. In saying this is an easy case, I am referring only to the conclusion that there is a private right of action. On the merits, the Sixth Circuit concluded that voters were entitled to cast a provisional ballot if they affirmed that they were eligible and registered to vote, but that these provisional ballots need not be counted if voters appeared in the wrong precinct. *Sandusky Cnty. Democratic Party*, 387 F.3d at 574-79.

294. 42 U.S.C. § 15481(a)(3)(A).

295. *See id.*

296. *See Taylor v. Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006); *Paralyzed Veterans*

One of those decisions, *Taylor v. Onorato*,<sup>297</sup> applied the wrong legal test. In denying plaintiffs relief, the court stated: “Nowhere in [HAVA] . . . does Congress indicate an intention that . . . [its voting equipment requirements] may be enforced by private individuals.”<sup>298</sup> But as I have explained, that is not the appropriate test for rights of action under § 1983, for which plaintiffs are *not* required to demonstrate that Congress intended to create a private *remedy* but rather to show that it created an individual right.

The other disability access decision, *Paralyzed Veterans of America v. McPherson*,<sup>299</sup> is more careful in its analysis, though it reaches the same conclusion.<sup>300</sup> After considering and rejecting the argument that *Gonzaga* only applies to statutes enacted under the Spending Clause, the *Paralyzed Veterans* court considered whether HAVA’s disability access requirement unambiguously conferred an individual right.<sup>301</sup> The court acknowledged the question to be a close and difficult one and found that Congress had not “expressly or impliedly” shut the door on § 1983 enforcement.<sup>302</sup> It also found that, given HAVA’s relatively clear mandate on disability access, private enforcement of this requirement would not “strain judicial competence.”<sup>303</sup> The court nevertheless held that this requirement was not enforceable under § 1983 due to the absence of unambiguous rights-creating language.<sup>304</sup> As applied by the court in *Paralyzed Veterans*, then, *Gonzaga* is a highly formalistic test. If the statute uses the term “right,” then it is presumptively enforceable under § 1983; if not, it is presumptively unenforceable—even if, as with HAVA’s disability access requirements, it is very clear whom the statute is designed to benefit. This is a defensible, though debatable, understanding of *Gonzaga*’s test. The alternative understanding is that a statutory requirement is presumptively enforceable under § 1983 so long as it is clear that Congress intended to protect a particular class of individuals. Measured by this less formalistic, more functional standard, HAVA’s disability access requirement would be privately enforceable.

The third provision of HAVA on which the question of private enforceability has arisen concerns the “matching” of information in statewide registration databases against motor vehicle records. It was this provision that was at issue in the Supreme Court’s brief per curiam opinion in *Brunner v. Ohio Republican Party*.<sup>305</sup> In that case, the Ohio Republican Party claimed that Ohio’s Democratic secretary of state was not matching voter registration information for new

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of Am. v. McPherson, No. C06-4670, 2006 WL 3462780, at \*10 (N.D. Cal. Nov. 28, 2006).

297. *Taylor*, 428 F. Supp. 2d 384.

298. *Id.* at 386.

299. *Paralyzed Veterans*, 2006 WL 3462780.

300. *Id.* at \*10.

301. *Id.* at \*8.

302. *Id.* at \*9.

303. *Id.* at \*10.

304. *Id.*

305. 129 S. Ct. 5, 6 (2008) (per curiam).

registrants, as the statute requires.<sup>306</sup> The relevant provision of HAVA reads as follows:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.<sup>307</sup>

It is difficult to see how this language confers an individual right upon anyone, much less how it does so “unambiguously” as *Gonzaga* requires. That is true whether one embraces a formalistic or functional understanding of *Gonzaga*. Not only does the statutory language avoid the term “right,” but the statute does not benefit any specific class of individuals. It simply requires election officials to enter into matching agreements with their states’ motor vehicle authorities, to the extent required to verify accuracy. Even putting aside the fact that the statute mandates only an *agreement*—and not, at least explicitly, the actual matching of voters—the statute is aimed at ensuring that voter registration information is accurate. There is no express indication of whom this provision is designed to benefit. In fact, the provision is aimed *not* at protecting any specific individuals, but rather at protecting the integrity of the system, by preventing voters from registering with false or inaccurate information. This requirement might well protect the public at large, by preventing voting by people who are not eligible (because they are disenfranchised felons or noncitizens, for example) and by preventing double-voting. But it does not unambiguously confer a right upon anyone, as *Gonzaga* demands.

Nevertheless, and quite remarkably, the lower courts found that the Ohio Republican Party had a right to sue under § 1983 to enforce HAVA’s matching requirement.<sup>308</sup> The district court found there to be a private right of action and issued a temporary restraining order against the Ohio secretary of state.<sup>309</sup> Its cursory analysis failed even to consider whether this provision unambiguously conferred an individual right. Instead, the court relied on *Sandusky County Democratic Party*’s conclusion that the provisional voting requirement was privately enforceable, noting that there was no indication that Congress intended to close the door to private litigation.<sup>310</sup> This misses the predicate question of whether the matching provision unambiguously confers an individual right.

A three-judge panel subsequently vacated the district court’s order on the

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306. *Id.*

307. 42 U.S.C. § 15483(a)(5)(B)(i) (2006).

308. *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 962 (S.D. Ohio), *aff’d*, 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008) (per curiam).

309. *Ohio Republican Party*, 582 F. Supp. 2d at 966.

310. *Id.* at 962 (citing *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)).

merits,<sup>311</sup> but the en banc Sixth Circuit reversed and reinstated the district court's decision.<sup>312</sup> Judge Sutton's opinion for a majority of the en banc court recites the existing test, acknowledging that *Gonzaga* requires an "unambiguously conferred" right.<sup>313</sup> There is nothing in the above-quoted language that comes close to conferring a right on any individual, much less does so "unambiguously"—and the en banc majority did not really argue to the contrary. Instead, the en banc court upheld the district court's order on the ground that, in this case, there is no individual to whom rights-creating language could conceivably apply.<sup>314</sup> As the court put it, this provision is one that "effectively benefits everyone but no one in particular."<sup>315</sup> Accordingly, Judge Sutton's majority opinion understood the *Gonzaga* test not to apply to this sort of case. Whatever the advantages of this mode of analysis, it is not consistent with *Gonzaga*, which is quite explicit in requiring that the relevant statute unambiguously confer a federal right.<sup>316</sup> Judge Moore convincingly made this point in her dissent from the en banc decision, noting that there is "absolutely no rights-creating language" in HAVA's matching statute.<sup>317</sup> As she rightly concluded, this was an easy case under *Gonzaga*'s demanding standard—one that the district court had clearly gotten wrong.

Although the en banc majority characterized the question before it as a "close" one,<sup>318</sup> it really was nothing of the sort. The conclusion that there is a private right of action to enforce the matching requirement is not defensible under *Gonzaga*. In this respect, the issue before the Supreme Court in *Brunner* was quite straightforward. The Court reversed the Sixth Circuit in a one-paragraph order, addressing the private-right-of-action issue in a single sentence: "Respondents, however, are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce Section 303 [of HAVA] in an action brought by a private litigant to justify the issuance of a TRO."<sup>319</sup> Given the absence of an unambiguously conferred right in HAVA's matching provision, this conclusion is undeniably correct under existing law.

The problem is that existing doctrine is wrong, at least when it comes to disputes implicating the electoral process. That doctrine misses the fact that electoral disputes implicate a different sort of interest than classic individual-rights cases. As Judge Sutton's en banc opinion recognized, they involve quintessentially *public* rights.<sup>320</sup> Existing private-right-of-action doctrine fails to

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311. *Ohio Republican Party*, 544 F.3d at 715.

312. *Id.* at 720-21.

313. *Id.* at 720 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

314. *Id.*

315. *Id.*

316. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

317. *Ohio Republican Party*, 544 F.3d at 727 (Moore, J., dissenting).

318. *Id.* at 719.

319. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008) (per curiam) (citing *Gonzaga Univ.*, 536 U.S. at 283); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

320. *Ohio Republican Party*, 544 F.3d at 720.

recognize such non-individuated or collective rights. But as I shall now argue, it should.

#### IV. PUBLIC RIGHTS IN FEDERAL ELECTION LAW

To this point, I have focused on the explanation and application of existing doctrine on private rights of action. As explained in Part II, *Gonzaga* forbids private enforcement of federal statutes through § 1983 absent an unambiguously conferred individual right. As explained in Part III, the Sixth Circuit failed to apply this doctrine in *Ohio Republican Party v. Brunner*. In this Part, I turn from application of existing doctrine to a critique of that doctrine, arguing that existing private-right-of-action doctrine fails to account for the vital role that federal courts play in overseeing U.S. election administration.

There is both a conceptual and practical dimension to the institutional role of federal courts when it comes to elections and, accordingly, to the problems with applying the existing test for private rights of action to cases arising in this area. Conceptually, election cases typically involve non-individuated harms. *Brunner* is a perfect example. The harms that would arise from a failure to comply with HAVA's matching procedures were not ones that would flow to any identifiable individual. They were instead injuries that could only be understood through their aggregate effect on voters and, more broadly, on the electoral system as a whole. This is what Judge Sutton's opinion for the en banc majority was getting at, in referring to HAVA's matching requirement as one that "effectively benefits everyone but no one in particular."<sup>321</sup> That requirement is designed to prevent the systematic skewing of elections, which might occur if ineligible people were to register and vote. While some commentators—myself included—believe those risks are greatly exaggerated, Judge Sutton was correct to recognize that the interests protected by HAVA's matching requirement cannot readily be conceptualized in individualistic terms.<sup>322</sup> This requirement is instead aimed at diffused harms that arise from the aggregate nature of the right to vote, the fact that each person's vote becomes meaningful only when joined with those of like-minded others.<sup>323</sup>

In this sense, the interest at stake in *Brunner* is typical of election cases, which tend to involve systemic rather than merely atomistic injuries.<sup>324</sup> The real problem is not (or at least not just) the harm to individual voters, but rather the risk that an electoral law or practice will disproportionately harm certain groups of voters, thereby threatening to skew electoral outcomes and, more broadly, the distribution of political power. It is in this sense that the interests protected by

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321. *Id.*

322. See *supra* note 311 and accompanying text.

323. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

324. Saul Zipkin makes a similar point in a forthcoming article, arguing that the "structural" harms typically at stake in election cases call for a modified standing inquiry. Zipkin, *supra* note 10 (manuscript at 5).

statutes like HAVA are best conceived as *public* rights. They belong to groups of citizens and to the larger public rather than to specific, identifiable individuals.<sup>325</sup> The idea that there must be an individual right, as *Gonzaga* demands, therefore misses the main interest that is typically at stake in election disputes.<sup>326</sup> The en banc majority in *Ohio Republican Party v. Brunner*<sup>327</sup> was right to recognize that the statute was aimed at protecting such rights. Its error was in thinking that existing doctrine allows for them to be considered.

*Brunner* provides a particularly salient example of a federal statute protecting a public right, given that the harm of which the Ohio Republican Party complained could not readily be understood in individual terms.<sup>328</sup> But it is not an isolated case. Other federal statutory requirements also protect group or collective interests, even though they may protect individual interests as well. Examples include each of the federal statutes discussed in Part III. As I have explained, § 1971's qualification and registration requirements can be understood as protecting the individual right to equal treatment.<sup>329</sup> Accordingly, there is a strong argument that these requirements are privately enforceable, even under the *Gonzaga* test. But these requirements do more than protect the individual right to vote; they also prevent systematic exclusion of certain groups of voters, including racial minorities, students, and women.<sup>330</sup> So too, UOCAVA does not merely protect the individual right to vote for uniformed and overseas voters, but prevents the systemic harm that would arise if these groups of voters were disproportionately excluded. Even provisions that are not clearly targeted to any specific individuals—such as UOCAVA's data collection provision—serve the collective interest of promoting a more fair and inclusive electoral process.

HAVA's various requirements likewise promote a fair electoral process, one that does not systematically skew elections for or against certain groups of voters. An example is HAVA's mandate that states ensure that "only voters who are not registered or who are not eligible to vote are removed."<sup>331</sup> In addition to protecting individuals from being wrongfully purged, this requirement prevents the systemic unfairness that may result from the disproportionate removal of certain groups of voters—like racial minorities or college students—from the

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325. In arguing for private enforcement of public rights, I disagree with Professor Sunstein, who has argued that statutes protecting collective interests should generally *not* be privately enforceable. Sunstein, *supra* note 87, at 435-36. Although not focused on election statutes, Professor Sunstein argued that "[c]ollective benefits are more often, and sometimes more appropriately, protected through public enforcement mechanisms than through private remedies." *Id.* at 435. This argument may have some currency with respect to statutes protecting other collective interests, but it has very little in the election-law context, for the reasons set forth in the text below.

326. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

327. 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008).

328. *Id.* at 720.

329. 42 U.S.C. § 1971 (2006).

330. See *supra* note 216 and accompanying text.

331. 42 U.S.C. § 15483(a)(2)(B)(ii).

rolls.

The idea that election laws protect collective as well as individual interests is, of course, a familiar one. It recalls the long-running debate among election law scholars over whether judicial review should focus on the protection of individual rights or the promotion of a fair democratic structure.<sup>332</sup> Structuralists have tended to focus on the collective interest in a fair democratic process, which I have called public rights, while proponents of the rights-based perspective have tended to focus on individual interests. Even if one takes a rights-based view of judicial review, however, that does not preclude the recognition of public rights as a basis for private enforcement of federal election statutes.<sup>333</sup> Whatever one's perspective on the appropriate role of courts in *constitutional* cases, it must be acknowledged that, when Congress enacts laws regulating the democratic process, those statutes sometimes protect collective interests as well as individual ones. The doctrine on private rights of actions should, accordingly, allow litigants to sue under § 1983 where a statute protects such public rights, and not just when it protects the individual right to vote. One need not be a structuralist to support the broad enforceability of election statutes, whether they protect individual or collective interests.

I have thus far explained why applying the *Gonzaga* test for private rights of action to election law cases is problematic on a conceptual level—namely, because this test fails to recognize that election statutes often confer public rights rather than just private or individual rights. But there is also a practical dimension to the problem, which concerns the unfortunate consequences that arise from applying the stringent test for private enforcement to election disputes. The *Gonzaga* test does not simply require that the federal statute protect an individual right; it also requires that the right be unambiguously conferred.<sup>334</sup> At least some courts have interpreted this requirement quite formalistically, as demanding that the statute use the word “right” (or some close approximation), as in the cases denying private enforcement of HAVA’s disability access requirements.

The practical problem with applying such a demanding test to election statutes relates to the vital role that federal courts now play in overseeing

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332. Sam Issacharoff and Rick Pildes are the leading proponents of the structural perspective, arguing that democratic politics be thought of as a sort of marketplace, with courts intervening to promote robust political competition. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). On the other side of the debate, Rick Hasen argues that courts should focus on promoting equality rights, rather than focusing on structural concerns, in determining when to intervene in democratic politics. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR TO BUSH V. GORE* 138-56 (2003).

333. The conception of equality that Professor Hasen advances includes a “collective action” principle, prohibiting unreasonable barriers to groups organizing politically. HASEN, *supra* note 332, at 88. This may be capacious enough to accommodate the non-individuated interests protected by statutes like HAVA.

334. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

American election administration, as described in Part I. Without a strong central election authority (as in India<sup>335</sup>) or a formal role for the judiciary in running elections (as in France<sup>336</sup>), the administration of U.S. elections is largely in the hands of party-affiliated election officials at the state and local level. Since 2000, federal courts have quite properly played a more active role in policing election administration, sometimes through constitutional adjudication and at other times through the enforcement of federal statutes. Without a private right of action, interpretation and implementation of federal election harms is left to the discretion of state and local election officials, many of whom have a conflict of interest because they are affiliated with political parties or elected to office. The only federal entity with the power to enforce those laws would be the U.S. Department of Justice (DOJ), which has a checkered history when it comes to the evenhanded enforcement of election statutes.<sup>337</sup> Leaving DOJ as the sole gatekeeper to the federal courts also tends to impede efforts to obtain authoritative clarification of ambiguous statutes such as HAVA, given the absence of a federal agency empowered to promulgate binding regulations. It also raises the possibility that federal election laws will be enforced only, or at least predominantly, in those instances where doing so will benefit the President's party. Allowing a private right of action thus provides a check on potential partisanship by DOJ, as well as state and local election officials.

It is certainly true that in some areas of law, allowing a private right of action might impede consistent implementation of federal law.<sup>338</sup> That is especially true where Congress has created an administrative agency with interpretive or enforcement authority. For better or for worse, that is not a problem with respect to the federal election statutes discussed in Part III, particularly HAVA, given the absence of an administrative agency with the power to issue binding interpretations of law. In fact, Congress specifically denied the EAC regulatory authority (outside of one narrow area) when it enacted HAVA.<sup>339</sup> Accordingly, private enforcement through § 1983 poses no real danger of muddying the law or impeding administrative enforcement.

Unfortunately, the *Brunner* Court did not consider either the conceptual or practical problems with applying existing private-right-of-action doctrine to election disputes. This is not surprising, given the brevity of the opinion and the compressed timetable on which the case was decided. In fact, the difficulty of thinking through all the ramifications of a decision is one of the main reasons for the Supreme Court being extraordinarily cautious in deciding whether to grant certiorari of pre-election cases.<sup>340</sup> In the appropriate case, the Court should revisit the issue and carve out an exception to the demanding test it has generally

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335. INDIA CONST. Dec. 1, 2007, art. 329(b).

336. 1958 CONST. art. 58 (Fr.).

337. See Tokaji, *If It's Broke, Fix It*, *supra* note 12, at 798-815.

338. Stewart & Sunstein, *supra* note 92, at 1290-94 (giving examples of such areas of law).

339. 42 U.S.C. § 15329 (2006). That area is mail voting under the NVRA. See *id.* §§ 1973gg-1973gg-10.

340. See Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1067, 1094.

prescribed for private enforcement under § 1983. Where federal election statutes are at issue, it should allow enforcement of public (and not just individual) rights and eliminate the requirement that the statute unambiguously confer a right, as *Gonzaga* demands.<sup>341</sup>

I close by considering two possible objections to my suggestion of a more generous test for private enforcement of federal election statutes. The first objection is that it would violate separation of powers. This is a familiar objection, extending at least as far back as Justice Powell's dissenting opinion in *Cannon*.<sup>342</sup> It is for Congress to determine whether and how federal statutes are to be enforced, the argument goes. Accordingly, it would violate separation of powers to allow a private right of action in cases where Congress has not done so.

This argument would have some force in cases where congressional intent to preclude enforcement through § 1983 is clear. In such cases, I would acknowledge that the statute cannot be enforced. But the set of cases with which this Article has been concerned are ones in which congressional intent is not clear—and it is therefore up to the courts to determine whether a private right of action lies. All three of the federal election statutes discussed above fall into this category.<sup>343</sup> Where congressional intent is not clear, courts can and should adopt presumptions to guide the determination whether the statutory requirement is privately enforceable. The Court has done just that, in adopting a general presumption against implication of private rights of action, and in generally refusing to allow § 1983 absent an unambiguously conferred individual right.<sup>344</sup> My argument is not that federal courts should disregard legislative intent, but rather that they should adopt a different presumption in election cases where the intent of Congress is not clear.<sup>345</sup> Should Congress disagree, it is always free to

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341. *Gonzaga v. Doe*, 536 U.S. 273, 282-83 (2002).

342. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 733 (1979) (Powell, J., dissenting) (asserting that for almost fifty years after *Rigsby*, the only other statute under which the Court had recognized an implied right of action was under the Railway Labor Act of 1926).

343. That includes HAVA, and Senator Dodd's statement that Republicans would not support inclusion of a right of action in the statute (*supra* note 284 and accompanying text) does not alter that conclusion. All this means is that Congress could not agree on whether to include an express right of action, thus throwing the question of its enforceability under § 1983 to the courts.

344. See *supra* Part II.B.

345. One might argue that my proposed revision changes the default rule, of which Congress should be presumed aware when it legislates. In other words, Congress knows that a statute like HAVA will not be enforceable unless it unambiguously confers individual rights. It therefore has reason to expect that requirements will not be privately enforced if they do not confer such a right. But this argument proves too much, for any judicial alteration to the rules governing rights of action (either implied or under § 1983) necessarily changes the default rule against which Congress legislates. Thus, if this argument were accepted, then all the decisions discussed in Part II that modified right-of-action doctrine are necessarily wrong. Moreover, there is little reason to believe that members of Congress are paying such close attention to the changing nuances of private-right-of-action doctrine. Accordingly, the modest change in the rule for private rights action that I

overrule the courts by taking away the right of action that they have allowed.

The other objection to my argument for private enforceability has to do with judicial competence in cases where the legal mandate is open to reasonable competing interpretations. At least in some cases, federal election law disputes may involve vague or ambiguous requirements. State and local election officials may be in a better position to evaluate the harms and benefits that would flow from a particular decision. By contrast, the argument goes, federal judges are likely to be inexperienced in running elections and therefore ill-equipped to balance competing harms. To concretize this problem, it is helpful to return to the set of facts that gave rise to *Brunner*.<sup>346</sup> Recall that the Ohio Republican Party claimed that the secretary of state was violating a statute requiring her to enter into an agreement to “match” voter registration information against other records “to the extent required to enable each such official to verify the accuracy of the information provided.”<sup>347</sup> Even assuming that this statute can be read as a mandate that election officials conduct registration matching, the statute is not very precise about when and how this matching should be done.<sup>348</sup> For example, what if there are minor discrepancies between the information in different databases? Under what circumstances is matching “required” to verify voter registration information? May a state dispense with matching entirely if it has a voter identification requirement to verify voter eligibility, as in Ohio?<sup>349</sup> Those who worry about judicial competence might contend that such judgments should be left to election officials, not made by federal judges.

There is considerable force to the concern that federal judges may act beyond their competence by supplanting the discretionary judgments of state and local election officials. But this is not a persuasive argument against allowing private enforcement of election statutes as a general matter. After all, the standard for determining whether there should be a private right of action under § 1983 already takes into consideration the specificity of the statutory mandate. Under *Golden Transit*, one of the three factors is whether the interest protected is sufficiently specific as to be judicially enforceable.<sup>350</sup> I do not propose that this factor be eliminated from the test. In addition, concerns regarding judicial competence may be taken into consideration when courts get to the merits of a dispute, and not simply when determining whether a right of action exists. In the dispute over the maintenance of state registration databases, for example, a court might well interpret HAVA to leave some discretion in election officials to determine whether and how to conduct matches. They might be more deferential to determinations made by election management bodies that are insulated from partisan politics (as in Wisconsin) than they are to determinations made by party-

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advocate cannot plausibly be said to upset Congress’s expectations.

346. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam).

347. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 713-14 (6th Cir.) (en banc) (quoting 42 U.S.C. § 15483(a)(5)(B)(i) (2006)), vacated, 129 S. Ct. 5 (2008).

348. See Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 6-7.

349. *Id.*

350. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 108 (1989).

affiliated state election officials (as in Ohio).<sup>351</sup> Judicial competence is therefore a serious concern, but it does not necessarily counsel against a private right of action; rather it may instead be considered at the merits stage in determining and applying the appropriate legal standard.

### CONCLUSION

Election cases are different.<sup>352</sup> They frequently involve collective interests, or public rights, that are not easily individuated. And they are cases for which a federal judicial forum is often vital, given the pervasive decentralization and partisanship of American election administration and the absence of an administrative body able to ensure the consistent implementation of the law. In *Brunner*, the Court failed to consider these distinctive aspects of federal election law disputes.<sup>353</sup> In fact, *both* the lower courts *and* the Supreme Court got it wrong in that case—even though they arrived at diametrically opposite conclusions. The lower courts incorrectly applied existing precedent, most notably *Gonzaga*, which clearly foreclosed private enforcement of HAVA’s matching requirement given the absence of an unambiguously conferred individual right.<sup>354</sup> But the Supreme Court was also incorrect in failing to reconsider this precedent to account for the especially important role the federal courts play in electoral disputes. Though faithfully applying existing doctrine, the Supreme Court missed the opportunity to correct—or at least limit—a line of precedent that has unfortunate consequences in the realm of election law. In the appropriate case, the Court should revisit *Brunner* and relax the standard for private enforcement of federal election statutes under § 1983.

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351. Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 8. I have chosen these states because they are ones in which database matching actually arose in 2008 and because they have contrasting methods of selecting their state election authorities. I have elsewhere argued that courts should be more deferential to election management bodies that are insulated from partisan politics than they are to election officials who have conflict of interest by virtue of their party affiliation. See Tokaji, *Lowenstein Contra Lowenstein*, *supra* note 11.

352. See generally Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (considering the possibility of special constitutional principles in the context of democratic politics).

353. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam).

354. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

# LANGUAGE ASSISTANCE AND LOCAL VOTING RIGHTS LAW

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## INTRODUCTION

In 2007, the City of Beverly Hills, California became entangled in a heated controversy over a local election policy designed to assist a major segment of its citizenry—one that by some estimates had grown to over one-quarter of the city’s population of 35,000.<sup>1</sup> For the March 2007 municipal election, the city clerk’s office had taken steps to translate the absentee and sample ballots into Farsi, the language commonly read and spoken by individuals of Iranian descent. Although Farsi translations of voting materials had first been employed two years earlier to assist Iranian American voters, the materials for the upcoming election ignited a new debate because of the city clerk’s decision to mail multilingual ballots—with Farsi characters in large print on the cover and throughout the booklet—to all registered Beverly Hills voters, not simply to those who had requested translated ballots.

The city clerk’s office was quickly flooded with telephone calls from hundreds of voters complaining about the materials for the upcoming election. Speaking to the local press, one Beverly Hills voter stated, “We got the ballot in the mail and there were all kinds of languages splattered over the front page and I got offended by it.”<sup>2</sup> Another resident added, “It sends a bad message. It’s a message which is divisive, which I believe is designed to separate as opposed to unite. In fact, it’s done that.”<sup>3</sup> And one voter who felt especially affronted—and threw away the ballot immediately after casting an absentee vote—bluntly stated, “It really looked like a menu from a Farsi restaurant with a translation in English.”<sup>4</sup>

In defense of the policy, the city clerk countered, “We don’t want to disenfranchise any section of our community from voting. We’re trying not to exclude. If writing the information in their language helps them to vote without anyone assisting them, we’re going to do it.”<sup>5</sup> Reinforcing the Beverly Hills City Council’s interest in promoting civic engagement, the city attorney commented that the council had requested Farsi translations three years earlier because “there

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1. See Tony Barboza, *For Some, Beverly Hills Ballots Went Too Farsi*, L.A. TIMES, Feb. 23, 2007, at A1; Ryan Vaillancourt, *Translated Sample Ballots Spark Community Backlash*, BEVERLY HILLS WKLY., Feb. 15, 2007, at 3.

2. Vaillancourt, *supra* note 1, at 3.

3. Barboza, *supra* note 1.

4. *Id.*

5. *Id.*

was a need in the community and it would encourage more and better informed political participation. Technically, Beverly Hills is not required by federal law to translate [election materials] into Farsi.”<sup>6</sup>

However, Jimmy Delshad, an Iranian American member of the city council who became the mayor of Beverly Hills after the 2007 election,<sup>7</sup> offered a more guarded opinion of the translated materials: “It’s possible that this ballot has gone overboard. We want to reach out to others, but at the same time make it one unified community[.] To the extent that it might be divisive, I don’t like it.”<sup>8</sup> Councilman Delshad’s skepticism ultimately signaled a shift in the city’s election policy: the council voted in August 2007 to have the city clerk mail out ballots primarily in English during subsequent election cycles; separate Farsi ballots would continue to be printed, but would only be made available to voters upon request.<sup>9</sup>

Beverly Hills—a city more renowned for its glamour and affluence than for its immigrant communities and election laws—may have a unique political landscape, but comparable demographic changes, public policies, and shifts in local power dynamics have developed in cities and suburbs across the country. Communities ranging from major urban centers such as New York, Chicago, Philadelphia, Miami, and Minneapolis to small cities with immigrant enclaves such as Beverly Hills and West Hollywood in Southern California have enacted policies that offer voluntary language assistance to local voters. In Miami-Dade County, for example, translations are available in Creole to assist the local Haitian American population. In Southern California, ballots are offered in Armenian in Glendale, in Russian in West Hollywood, and in Khmer (Cambodian) in Long Beach. And in Chicago, forms of voter assistance are available in English and fifteen additional languages. These recent developments are particularly significant because they reflect policy initiatives that go well beyond federal language assistance mandates contained in the Voting Rights Act

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6. Vaillancourt, *supra* note 1, at 5. Local institutions also voiced support for the policy. A *Los Angeles Times* editorial article, for instance, noted, “There’s nothing new about hostile reaction to foreign languages appearing alongside English on signs, pamphlets and other official reading material. But there’s something more comical about it when it happens in Beverly Hills. . . . [where the] clash isn’t about (comparatively) rich versus poor but rather (comparatively) rich versus rich.” Editorial, *Beverly Hills Is Within Its Rights, and Maybe Its Obligations, to Print Voting Materials in Persian*, L.A. TIMES, Feb. 24, 2007, at A20. The editorial concluded, “Beverly Hills is completely justified in printing its ballots in Persian. Foreign tongues don’t taint the ballot, they demonstrate the values it stands for.” *Id.*

7. See Sonya Geis, *Iran Native Becomes Mayor of Beverly Hills; Bridging Cultures Is a Big Part of His Role*, WASH. POST, Apr. 1, 2007, at A3.

8. Barboza, *supra* note 1, at A1. Councilman Delshad later asserted that the Farsi ballot had magnified resentment against Iranian Americans and that despite his eventual success in the 2007 election, he had lost several hundred votes because of the backlash. Elisa Osegueda, *Council Says Farsi Ballot Issue Misunderstood—System to Be Changed for the 2009 Elections*, BEVERLY HILLS WKLY., Aug. 23, 2007, at 3.

9. Osegueda, *supra* note 8, at 3.

of 1965 (“the Act”).<sup>10</sup>

Local language assistance policies offer important insights into the strengths and weaknesses of federal voting rights law, as well as into larger questions about anti-discrimination law and the role of language assistance in helping communities integrate immigrants into civic life. The Voting Rights Act’s primary language assistance mandates are structured largely to remedy discrimination in both the electoral process and in education—a root cause of depressed political participation by language minorities. However, the Act’s mandates are not designed to address the needs of limited-English proficient voters as a whole. Recent state and local policies have therefore begun to fill significant gaps in federal law.

Language assistance policies also provide insights into the expansion of voting rights jurisprudence more generally, a trend that is reflected both in local legislation and in remedies adopted in federal litigation involving local governments. Unlike the language assistance provisions of the Act, many recent policies are more aptly classified as accommodation measures, comparable to those developed in laws that address discrimination on the basis of disability or religion. Prospective rather than strictly remedial, these measures require the removal of impediments to participation in order to prevent discrimination against protected individuals.<sup>11</sup> In addition, language assistance policies offer insights into broader policy agendas that promote civic engagement and address the integration of immigrant populations into local communities. Language assistance in voting is often one of several tools—including offering greater opportunities for immigrants to learn English and providing language assistance in other key sectors such as education, social services, health care, and the justice system—that form a network of rights and services which promote civic participation.

At the same time, language assistance is still a hotly contested political issue regardless of whether the underlying goal is remedying discrimination or promoting civic engagement. Federal, state, and local policymaking have been colored by longstanding debates between advocates of assimilation, who typically require English fluency as a precondition for civic activities such as voting, and those endorsing ethnic pluralism and the maintenance of non-English languages among minority groups.<sup>12</sup> Many policymakers and citizens remain

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10. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

11. I have previously argued that trends at the federal level, including litigation under sections 203 and 2 of the Voting Rights Act, have pushed federal voting rights law in the direction of increased legal accommodations for language minorities. See Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 293 (Ana Henderson ed., 2007). My analysis here builds on that discussion and focuses on state and local developments as sources of movement toward greater language accommodations.

12. See generally RONALD SCHMIDT, SR., LANGUAGE POLICY AND IDENTITY POLITICS IN THE UNITED STATES 130-62 (2000) (comparing assimilationist and pluralist arguments); Juan F. Perea,

resistant to change, and some governments have moved in the opposite direction of promoting language assistance, enacting English-only policies and significant restrictions on immigrants' rights.<sup>13</sup> Language assistance, as illustrated by the recent controversy in Beverly Hills over Farsi ballots, will no doubt remain a highly contentious issue in communities throughout the country.

In this Article, I explore these developments through an analysis of federal, state, and local voting rights law. In Part I, I examine the scope of language needs nationwide and discuss the limits of the language assistance provisions of the Act. In Part II, I focus on state and local policymaking in a number of contexts: as elements of settlement agreements in federal litigation; in anticipation of impending mandates under the Act; and as voluntary efforts that respond to local populations and community needs. Although my analysis covers several states and localities, it is designed merely to be illustrative; I have made no attempt to engage in a comprehensive survey of the jurisdictions that provide language assistance. In Part III, I discuss the implications of local language assistance policies in advancing broader goals in anti-discrimination law, civic engagement, and immigrant integration.

## I. THE LIMITS OF FEDERAL LANGUAGE ASSISTANCE

The Act is unusual among major civil rights laws in that it contains explicit protections for language minority groups. Widely used anti-discrimination statutes such as Title VI<sup>14</sup> and Title VII<sup>15</sup> of the Civil Rights Act of 1964 contain prohibitions on national origin discrimination. These prohibitions have been interpreted through agency regulations and by Executive Order to encompass forms of language discrimination, including speak-English-only policies.<sup>16</sup> The Act, however, contains no direct references to national origin discrimination. Instead, the Act contains several sections that address past and ongoing discrimination against specific language minority groups and promote electoral accessibility for limited-English proficient voters.<sup>17</sup>

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*Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) (outlining legal history of tensions between linguistic pluralism and assimilation).

13. See Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

14. 42 U.S.C. §§ 2000d-2000d-4a (2006) (prohibiting discrimination by recipients of federal funding).

15. *Id.* §§ 2000e-2000e-17 (2006 & Supp. 2008) (prohibiting discrimination in employment).

16. See, e.g., Exec. Order No. 13,166, 3 C.F.R. § 289 (2000) (establishing standards for services to limited-English proficient individuals by federal agencies and recipients of federal funding); 29 C.F.R. § 1606.7 (2009) (addressing English-only rules in the workplace).

17. See 42 U.S.C. § 1973b(f) (2006) (congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures); *id.* § 1973aa-1a (bilingual election requirements); *id.* § 1973aa-6 (voting assistance for blind, disabled, or

The language rights provisions of the Act embody three distinct but related models of anti-discrimination enforcement.<sup>18</sup> One model—a structural remediation model—is embodied in the requirements of sections 4(f)(4)<sup>19</sup> and 203<sup>20</sup> of the Act. Designed to be temporary and limited in scope, the mandates in these sections address the electoral and educational discrimination that Congress has documented against language minorities by requiring oral and written assistance in communities with large minority populations. A second model—a traditional anti-discrimination model—is embodied in section 2 of the Act, which is a permanent provision that prohibits discrimination on the basis of race, color, or membership in a language minority group. A third model—an accommodation model—is embodied in section 208,<sup>21</sup> which Congress added in 1982 primarily to assist disabled and illiterate voters, but which has evolved into a guarantee of assistance for limited-English proficient voters as well. Together, these provisions form a network of language rights under the Act, but as census data and other empirical studies make clear, the needs of limited-English-speaking voters are considerably larger than the scope of the Act's coverage. Many of the basic limitations of the Act thus form the backdrop for the enactment of local policies designed to meet unaddressed language assistance needs.

#### *A. The Scope of Language Needs*

With numbers fueled by immigration, as well as by insufficient opportunities to learn English through public schools<sup>22</sup> and adult education programs,<sup>23</sup> limited-English proficient individuals constitute a large and growing segment of the American population. According to 2007 U.S. Census Bureau data, 19.7% of the American population aged five or over—over fifty-five million people—spoke a language other than English at home.<sup>24</sup> Of this number, approximately 24.5

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illiterate persons). The Act's general antidiscrimination provision, contained in section 2 of the Act, prohibits the denial or abridgement of the right to vote based on membership in a language minority group, in addition to prohibiting discrimination on account of race or color. *Id.* § 1973(a) (cross-referencing language minority group rights contained in § 1973b(f)(2)).

18. See Ancheta, *supra* note 11, at 300-05.

19. 42 U.S.C. § 1973b(f).

20. *Id.* § 1973aa-1a.

21. *Id.* § 1973aa-6.

22. See H.R. REP. NO. 109-478, at 50-52 (2006), available at 2006 WL 1403199 (summarizing congressional findings on educational inequalities facing language minorities).

23. See JAMES THOMAS TUCKER, THE ESL LOGJAM: WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS 1 (2006), available at <http://www.naleo.org/downloads/ESLReportLoRes.pdf>. Data collected on English as a Second Language (ESL) adult education classes have revealed that waiting periods for enrolling in ESL classes can range from several weeks to a number of years; moreover, many ESL providers do not maintain waiting lists at all because the demand for classes far exceeds the supply. *Id.* at 1-2.

24. HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE

million people spoke English less than “very well,”<sup>25</sup> thus meeting the definition of “limited-English proficient” under the Act.<sup>26</sup> The largest number of Americans who spoke English less than “very well” in 2007 were Spanish speakers—nearly 16.4 million people—with significant numbers of Chinese (1.37 million), Vietnamese (over 744,000), and Korean speakers (over 618,000) falling into the less-than-very-well categories.<sup>27</sup> Other language groups have undergone major increases in recent years: from 1990 to 2000, the number of Russian speakers nearly tripled from 242,000 to 706,000, and, in 2000, approximately 57% (over 400,000) spoke English less than very well.<sup>28</sup> During the same period, the number of French Creole speakers, covering Haitian Americans, more than doubled from 188,000 to 453,000, and approximately 46% (over 200,000) spoke English less than very well.<sup>29</sup>

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UNITED STATES: 2007, at 2 tbl.1 (Apr. 2010) [hereinafter CENSUS—LANGUAGE USE 2007], available at <http://www.census.gov/prod/2010pubs/acs-12.pdf>. The figures for 2007 marked an increase from 17.8% (46.9 million people) in 2000, 13.8% (31.8 million people) in 1990, and 11% (23.1 million people) in 1980. *See id.* at 6 tbl.2.

25. *Id.* at 2 tbl.1. The U.S. Census Bureau categorizes English language ability under the headings “very well,” “well,” “not well,” and “not at all.” *Id.* at 1. The Bureau also calculates the number of households that are “linguistically isolated” as a measure of how well an individual can communicate with public officials, medical personnel, and other service providers. HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 9 (Oct. 2003) [hereinafter CENSUS—LANGUAGE USE 2000], available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>. A linguistically isolated household is “one in which no person aged [fourteen] or over speaks English at least ‘[v]ery well.’” In 2000, over 4.4 million households—covering 11.9 million people—were considered linguistically isolated. *Id.* at 10.

26. *See* 42 U.S.C. § 1973aa-1a(b)(3)(B) (2006) (defining limited-English proficient voters as individuals who are “unable to speak or understand English adequately enough to participate in the electoral process”). The House Report on the 1992 Amendments to the Act identifies the manner by which the Census Director determines the number of limited-English proficient (LEP) individuals:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. . . . The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided—“very well,” “well,” “not well,” or “not at all.” The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP.

H.R. REP. NO. 102-655, at 6 (1992), reprinted in 1992 U.S.C.C.A.N. 766, 772.

27. *See* CENSUS—LANGUAGE USE 2007, *supra* note 24, at 7 tbl.3.

28. CENSUS-LANGUAGE USE 2000, *supra* note 25, at 4 tbl.1.

29. *Id.* Non-English-language speakers are further concentrated in key areas of the country, particularly in states and localities that are entry points for immigrants. In 2007, ten states had over one million non-English-language speakers, led by California (14.4 million), Texas (7.4 million), New York (5.2 million), Florida (4.5 million), and Illinois (2.6 million). CENSUS—LANGUAGE USE 2007, *supra* note 24, at 9 tbl.4. Counties with high proportions of non-English-language speakers included large cities such as New York City, Chicago, and Los Angeles. Los Angeles County alone

Many limited-English proficient individuals are non-citizens who are not yet eligible to vote, but significant blocs of voters—including both U.S.-born citizens and naturalized citizens—lack the requisite English skills needed to participate meaningfully in the electoral process. Congress has long recognized that many Puerto Ricans, who are American citizens by birth, have been educated in Spanish-dominant schools and face barriers in English-only electoral procedures.<sup>30</sup> According to 2000 census figures, over one-quarter of Puerto Ricans are limited-English proficient.<sup>31</sup> Similarly, many Pacific Islander groups, including Native Hawaiians and Guamanians, are citizens by birth, yet high rates of limited-English proficiency persist among these populations—approximately one in seven Pacific Islanders according to census data.<sup>32</sup> And among Alaska Natives and American Indians, who are also citizens by birth, significant numbers of the population are limited-English proficient;<sup>33</sup> moreover, Congress has recognized the importance of preserving Native American languages, and the use of native languages is strongly supported by federal policy.<sup>34</sup>

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had over 2.5 million residents who were limited-English proficient in 2000; of these, 1.8 million were Latino and over 500,000 were Asian American. ASIAN PAC. AM. LEGAL CTR. OF S. CAL., L.A. SPEAKS: LANGUAGE DIVERSITY AND ENGLISH PROFICIENCY BY LOS ANGELES COUNTY SERVICE PLANNING AREA 6 (2008) [hereinafter APALC—L.A. SPEAKS], *available at* <http://demographics.apalc.org/wp-content/uploads/2008/03/la-speaks-final-031908.pdf>.

Studies of state and local data have also revealed high rates of limited-English proficiency among members of particular ethnic groups. *See id.* at 6-9 (presenting data on limited-English proficient populations in Los Angeles County); ASIAN PAC. AM. LEGAL CTR. OF S. CAL., CALIFORNIA SPEAKS: LANGUAGE DIVERSITY AND ENGLISH PROFICIENCY BY LEGISLATIVE DISTRICT 6-8 (2006), *available at* [http://apalc.org/demographics/wp-content/uploads/2006/09/apalc\\_californiaspeaks.pdf](http://apalc.org/demographics/wp-content/uploads/2006/09/apalc_californiaspeaks.pdf) (presenting data on limited-English proficient populations in California). For instance, in Los Angeles County, among adults aged eighteen to sixty-four, 71% of Guatemalans, 70% of Hondurans, 67% of Vietnamese, 66% of Cambodians, 66% of Salvadorans, 63% of Koreans, 55% of Chinese, 52% of Mexicans, and 49% of Armenians were limited-English proficient. APALC—L.A. SPEAKS, *supra*, at 8.

30. *See* 42 U.S.C. § 1973b(e) (2006) (prohibiting English-only literacy tests for persons educated in “American-flag schools” where predominant classroom language was not English).

31. ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES 10 (Dec. 2004), *available at* <http://www.census.gov/prod/2004pubs/censr-18.pdf>.

32. PHILIP M. HARRIS & NICHOLAS A. JONES, U.S. CENSUS BUREAU, WE THE PEOPLE: PACIFIC ISLANDERS IN THE UNITED STATES 11 (Aug. 2005), *available at* <http://www.census.gov/prod/2005pubs/censr-26.pdf>.

33. According to 2000 census data, approximately 10% of American Indians and Alaska Natives spoke English less than very well and were therefore limited-English proficient. STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 7 (Feb. 2006), *available at* <http://www.census.gov/population/www/socdemo/race/censr-28.pdf>. Some groups have considerably higher rates of limited-English proficiency; for example, among Navajo speakers, one in four were limited-English proficient, while among Eskimo speakers, over 15% were limited-English proficient. *Id.*

34. *See* Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434

While the federal immigration and naturalization laws have long contained English language requirements for gaining naturalized citizenship, the degree of English proficiency needed to qualify for citizenship is only a level of basic comprehension.<sup>35</sup> Informed and meaningful voting, particularly in states and localities that employ direct democracy mechanisms such as referenda and initiatives, may require considerably higher levels of English fluency. There are also important exceptions in the naturalization laws for long-term residents of the United States who are elderly; these individuals need not demonstrate knowledge of English as a prerequisite to naturalization.<sup>36</sup> Empirical data suggest that limited-English proficient elderly citizens are among the voters most in need of language assistance.<sup>37</sup>

Community-based surveys underscore the need for language assistance among limited-English proficient voters. In one multistate survey of voters conducted during the November 2008 election, data showed that high rates of limited-English proficiency persist among several groups and that many voters have strong preferences for language assistance.<sup>38</sup> In New York City, where the Act mandates assistance for multiple language minority groups, 62% of Chinese American voters surveyed in Brooklyn were limited-English proficient and 43% preferred voting with language assistance; in Queens, 75% of Korean American voters were limited-English proficient and 29% preferred voting with language assistance.<sup>39</sup> The survey also found that voters' needs and interest in language assistance were comparable in localities without mandated Act coverage. In Chicago (Cook County), 81% of Korean American voters were limited-English proficient and 43% preferred voting with language assistance; in New Orleans, 63% of Vietnamese American voters were limited-English proficient and 45% preferred voting with language assistance.<sup>40</sup>

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(codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2006)).

35. 8 U.S.C. § 1423(a)(1) (2006).

36. The naturalization laws create exceptions for an applicant who is over the age of fifty and has resided in the U.S. as a lawful permanent resident for over twenty years, as well as for an applicant who is over the age of fifty-five and has resided in the United States for over fifteen years. Applicants need not demonstrate English proficiency, but they must still fulfill other requirements, including demonstrating a basic knowledge of American government and civics. *Id.* § 1423(b)(2).

37. See APALC—L.A. SPEAKS, *supra* note 29, at 9. Among particular ethnic groups of seniors aged sixty-five or older in Los Angeles County, the proportions of individuals who were limited-English proficient were especially high; the groups with the ten highest percentages of limited-English proficiency were as follows: Taiwanese—93%, Vietnamese—88%, Cambodian—86%, Salvadoran—85%, Iranian—84%, Guatemalan—83%, Chinese—82%, Chinese (Non-Taiwanese)—81%, Korean—81%, Armenian—78%. *Id.*

38. GLENN D. MAGPANTAY, ASIAN AM. LEGAL DEFENSE & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2008 ELECTIONS 15 (2009) [hereinafter ASIAN AMERICAN ACCESS TO 2008 ELECTIONS], available at <http://aaldef.org/docs/AALDEF-AA-Access-to-Democracy-2008.pdf> (survey focused on Asian American voters in eleven states and the District of Columbia).

39. *Id.*

40. *Id.*

The language assistance provisions of the Act cover many of the voters who fall within these clusters and categories, but numerous limited-English proficient voters do not receive assistance either because they do not trigger the Act's coverage or because they fall outside the Act's formal definitions of language minority groups. Cambodian Americans, for instance, lacked a sufficiently large population in Los Angeles County after the 2000 census to trigger section 203 coverage,<sup>41</sup> while Arab Americans, Armenians, Iranians, Russians, and Haitians are among the many groups whose languages are simply not covered by the Act. The omissions are not oversights; the Act has particular goals and circumscribed procedures that extend coverage in only limited instances.

### *B. Structural Remediation and Language Assistance*

In 1975, Congress amended the Voting Rights Act of 1965 in a number of significant ways to address discrimination against language groups. First, Congress recognized that denials of voting rights were not limited to black voters in the South and expanded the Act's basic prohibitions to include discrimination against members of "language minority" groups. The 1975 amendments ensured that individuals of Spanish heritage, as well as Asian Americans, American Indians, and Alaska Natives, were also protected by the Act.<sup>42</sup> Second, the amendments established a set of structural remedies, contained in sections 4(f)(4) and 203, to address longstanding discrimination against language minorities.<sup>43</sup> Congress recognized that discrimination in education—including segregation and disparities in school financing and resources—had caused minority communities

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41. *Informational Hearing on the Federal Voting Rights Act: Hearing Before the S. Comm. Elections, Reapportionment & Const. Amendments Comm.* 2005-06 Reg. Sess. 3-4 (Cal. 2005) (statement of Karin Wang, V.P. Programs, Asian Pac. Am. Legal Ctr.), available at [http://www.sen.ca.gov/reapportionment/HearingsTestimony/KarinWang12\\_5\\_2005.pdf](http://www.sen.ca.gov/reapportionment/HearingsTestimony/KarinWang12_5_2005.pdf).

42. 42 U.S.C. § 1973l(c)(3) (2006); *id.* § 1973aa-1a(e). The legislative history of the 1975 amendments shows a clear congressional intent to extend the Act's coverage beyond anti-black racial discrimination. See S. REP. NO. 94-295, at 24-35 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 790-801. However, Congress chose to employ "language minority" status rather than the category of "national origin" as the operative language, which ultimately limited the Act's coverage to the four enumerated groups. *Id.*

Both the Act's general anti-discrimination provisions under section 2, 42 U.S.C. § 1973, and its preclearance provisions under section 5, 42 U.S.C. § 1973c, were amended to include language minorities. Section 5 requires state and local governments with a long history of discrimination and depressed minority political participation to "preclear" any changes to their electoral procedures either through administrative review by the Department of Justice or a declaratory judgment by a three-judge panel of the U.S. District Court for the District of Columbia. *Id.*

43. Section 4(e) of the original 1965 Act recognized the connection between English-language-proficiency and voting discrimination in the case of Puerto Rican voters, many of whom had been educated in Spanish-dominant educational environments. The Act now prohibits English-only literacy tests for "persons educated in American-flag schools in which the predominant classroom language was other than English." 42 U.S.C. § 1973b(e).

throughout the nation to suffer from high rates of illiteracy, which was measured by failure to complete the fifth grade. In tandem with discrimination in the electoral process itself, educational inequalities and illiteracy had led to low rates of voter registration and voting by language minorities. Congress concluded that electoral procedures conducted only in English would therefore be inherently discriminatory and established requirements for translated voting materials, oral assistance, and other language-based remedies.<sup>44</sup> At the same time, Congress found that problems of discrimination and low political participation were not as severe among other populations and limited the scope of the Act's remedies to the four enumerated language minority groups.<sup>45</sup>

The persistence of discrimination against language minorities has led Congress to reauthorize sections 4(f)(4) and 203 multiple times, with the most recent reauthorization in 2006 extending the language assistance sections for an additional twenty-five years.<sup>46</sup> Section 4(f)(4) applies to a small number of

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44. Section 203(a) states:

The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

42 U.S.C. § 1973aa-1a(a); *see also id.* § 1973b(f)(1) (documenting similar findings to justify section 4(f)(4)).

45. The Senate Judiciary Committee considered the inclusion of other language groups but declined to do so because of the lack of evidence of substantial discrimination or depressed political participation for other groups, as well as because of significant differences in the histories of the four language minority groups compared to European immigrants. S. REP. NO. 94-295, at 31 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 797-98. The House also rejected amendments to the Voting Rights Act that would have added coverage for other language groups. 121 CONG. REC. H16,898 (daily ed. June 4, 1975) (rejecting amendment of Rep. Biaggi); *id.* at H16,907 (daily ed. June 4, 1975) (rejecting amendment of Rep. Solarz). *See generally* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS 60-62 (2009). Since 1975, Congress has not added any new language groups to the Act's coverage. *Id.* at 62-64.

46. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. The House Judiciary Committee's report summarized its findings regarding ongoing discrimination against language minorities as follows:

The continued need for bilingual support is reflected by: (1) the increased number of linguistically isolated households, particularly among Hispanic and Asian American communities; (2) the increased number of language minority students who are considered to be English language learners, such that students do not speak English well enough to understand the required curriculum and require supplemental classes; (3) the continued disparity in educational opportunities as demonstrated by the disparate impact

jurisdictions with longstanding histories of discrimination,<sup>47</sup> while section 203 applies nationally through a variety of triggering formulas that cover multiple jurisdictions and language groups based on census data. Under one test, section 203 requires language assistance in a state or political subdivision in which more than 5% of the voting-age citizens are members of a language minority group, are limited-English proficient, and have an illiteracy rate that exceeds the national illiteracy rate.<sup>48</sup> Under a similar test, the 5% trigger is replaced with a numerical benchmark requiring that the language group have over 10,000 limited-English proficient voting-age citizens in a jurisdiction.<sup>49</sup>

The section 203 formulas recognize the relationships among education, language ability, and voting, as well as Congress's conclusion that discrimination against language minorities is a widespread problem that requires no particularized showing of past discrimination in a covered jurisdiction. The formulas also illuminate the cost-benefit calculations that are inherent in providing language assistance to limited-English proficient voters. Minority populations must be sufficiently large—satisfying either a 5% population trigger

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that budget shortfalls have on language minority citizens, and the continued need for litigation to protect English language learners; and (4) the lack of available literacy centers and English as a Second Language programs.

H.R. REP. NO. 109-478, at 29 (2006), *available at* 2006 WL 1403199.

Support for the language assistance provisions of the Voting Rights Act has not, however, been universal. In 2006, an amendment offered by Representative Steve King to reauthorization legislation would have eliminated section 203 of the Act, but it was defeated by a vote of 238-185 in the House of Representatives. *See The U.S. Congress Votes Database*, WASH. POST, <http://projects.washingtonpost.com/congress/109/house/2/votes/372> (last visited Oct. 17, 2010).

47. Section 4(f)(4) prohibits English-only materials and requires language assistance in states and political subdivisions where: (1) over 5% of the voting-age citizens were, on November 1, 1972, members of a language minority group; (2) registration and election materials were provided only in English on that date; and (3) less than 50% of the voting-age citizens were registered to vote or voted in the 1972 presidential election. 42 U.S.C. § 1973b(f) (2006); *id.* § 1973b(b). By using information from 1972, the section focuses on areas with more serious histories of discrimination. In addition, jurisdictions that satisfy the triggering formula must obtain preclearance of changes in election procedures under section 5 of the Act. 42 U.S.C. § 1973c.

48. 42 U.S.C. § 1973aa-1a(b)(2)(A). Congress amended section 203 in 1982 to require that a language minority group also be limited-English proficient in order to satisfy the statistical benchmark, which actually led to a reduction in the total number of eligible jurisdictions. *See H.R. REP. NO. 102-655*, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 773.

49. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II). The numerical figure was designed to cover language groups with significant numbers who might not trigger the 5% test because they reside in a high-population county. The 1992 amendments to the Act expanded section 203's coverage to include political subdivisions that contain all or any part of an American Indian reservation in which over 5% of the residents are members of a single language group, are limited-English proficient, and have an illiteracy rate exceeding the national average. Act of Aug. 26, 1992, Pub. L. No. 102-344, § 2, 100 Stat. 921 (codified as amended at 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III) (2006)).

or a 10,000-citizen population trigger—in order to justify the expense to local government of providing language assistance. The benefits to voters whose group populations fall below the numerical triggers are not adequately justified, at least in Congress's view, by the costs of providing translated election materials and oral assistance to those voters.

Sections 4(f)(4) and 203 reach a wide range of states, counties, American Indian reservations, and language groups. Based on 2000 census data, over 500 jurisdictions are covered by one or both provisions of the Act, and nearly fifty jurisdictions must provide assistance in more than one language.<sup>50</sup> Among the most common language groups covered are speakers of Aleut, Apache, Chinese, Eskimo, Japanese, Korean, Navajo, Sioux, Spanish, Tagalog (Filipino), and Vietnamese.<sup>51</sup> Nationally, over four million limited-English proficient voters were protected by the language assistance provisions in accordance with the federal government's 2002 determinations of coverage; nearly 82% of these voters spoke Spanish, and nearly 17% spoke an Asian language.<sup>52</sup>

Regulations to enforce the Act have also generated an array of language assistance practices that apply to materials sent by mail, voter registration, public notices, polling place activities, and publicity;<sup>53</sup> various practices include forms of targeted oral assistance<sup>54</sup> and translations of written materials such as official ballots, sample ballots, informational materials, and petitions.<sup>55</sup> Compliance litigation by the Department of Justice has added to the regulatory mandates, and common remedies contained in court orders and consent decrees include requirements that localities develop outreach plans, hire bilingual poll workers and a language-assistance coordinator, and create a community advisory body to work with local officials.<sup>56</sup>

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50. See TUCKER, *supra* note 45, at 114-15 (505 political subdivisions covered by one or both provisions).

51. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872-922 (July 26, 2002).

52. See TUCKER, *supra* note 45, at 126 (total of 4,026,381 limited-English proficient voters covered (Spanish (3,290,018), Asian American (672,750), American Indian (56,679), and Alaska Native (6934)).

53. 28 C.F.R. § 55.18 (2006).

54. *Id.* § 55.20.

55. *Id.* § 55.19(a); see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-182, BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS' STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE (2008), available at <http://www.gao.gov/new.items/d08182.pdf> (overview of procedures adopted in a sample of covered jurisdictions).

56. See, e.g., Memorandum of Agreement, United States v. Riverside Cnty. (C.D. Cal. Jan. 26, 2010) (No. 2:10-CV-01059), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/riverside\\_moa2.pdf](http://www.justice.gov/crt/voting/sec_203/documents/riverside_moa2.pdf); Agreement and Order, United States v. City of Walnut (C.D. Cal. Nov. 9, 2007) (No. 2:07-cv-02437-PA-VBK), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/walnut\\_cd.pdf](http://www.justice.gov/crt/voting/sec_203/documents/walnut_cd.pdf); Settlement Agreement, United States v. City of Phila. (E.D. Pa. Apr. 26, 2007) (No. 06-4592), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/phila\\_settlement.pdf](http://www.justice.gov/crt/voting/sec_203/documents/phila_settlement.pdf); Order, United States v. City of Bos. (D. Mass. Oct. 18, 2005) (No. 1:05-cv-

Although there are persistent problems arising from flawed implementation of the law by covered jurisdictions—including inadequate training of poll workers, mistranslations of ballot language and candidate names, and insufficient assistance at poll sites<sup>57</sup>—there have been strong, positive effects on voter participation because of the language assistance provisions.<sup>58</sup> During the 2006 reauthorization of the Act, for example, the House Judiciary Committee Report concluded that “increases in language minority citizen registration and turnout rates are most significant in jurisdictions that are in compliance with Section 203’s election assistance requirements” and that “enforcement of Section 203 has resulted in significantly narrowed gaps in electoral participation.”<sup>59</sup>

Notwithstanding the impact of the language assistance provisions, there are inherent limits in the Act regardless of whether jurisdictions are in full compliance with the law. First, the inflexibility of the formulas that trigger coverage makes the congressional remedies incomplete because the statistical formulas operate like toggle switches to initiate language assistance within a jurisdiction. If a group satisfies a statistical benchmark—either the 5% figure or the 10,000 numerical figure—then the full array of language assistance mandates go into effect; however, if a benchmark is not satisfied, then no federal mandates are deployed at all. If a language minority population lacks a critical mass in a jurisdiction to trigger coverage because of its size, then the Act does not require even limited or partial assistance.<sup>60</sup>

Second, because the “language minority” definition has been tethered to congressional findings of discrimination and reduced political participation among the four enumerated groups, assistance for all other language groups falls outside the coverage of the Act. Even though there has been recent evidence showing that language groups such as Arab Americans<sup>61</sup> and Haitian Americans<sup>62</sup>

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11598-WGY), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/boston\\_cd2.pdf](http://www.justice.gov/crt/voting/sec_203/documents/boston_cd2.pdf).

57. See, e.g., James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163 (2007); ASIAN AMERICAN ACCESS, *supra* note 38, at 4; NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, SOUND BARRIERS: ASIAN AMERICANS AND LANGUAGE ACCESS IN ELECTION 2004 (2005), available at [http://65.36.162.215/files/sound\\_barriers.pdf](http://65.36.162.215/files/sound_barriers.pdf).

58. See TUCKER, *supra* note 45, at 229-31.

59. H.R. REP. NO. 109-478, at 12 (2006), available at 2006 WL 1403199 (internal citations and quotations omitted).

60. A related problem is that the Act’s triggering formulas may not take into account the growth of local populations between official census data collections. The Act was amended in 2006 to require data from the U.S. Census Bureau’s American Community Survey, which are to be applied every five years to determine section 203 coverage; prior to 2006, data for determining coverage was collected through the decennial census. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2006). Nevertheless, federal data collected at five-year intervals may not reflect the latest demographic changes in faster-growing immigrant communities.

61. See Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 327 (Ana Henderson ed., 2007);

have suffered comparable discrimination and exhibit depressed levels of political participation, Congress has declined to add any new groups to the language minority categories since 1975. These and other shortcomings in the language provisions of the Act<sup>63</sup> seem unlikely to be revised in the immediate future because Congress's most recent reauthorization of the Act was in 2006, and many of these problems surfaced in committee hearings and floor debates but were ignored in the final legislation.<sup>64</sup>

### C. Additional Language Assistance: Anti-Discrimination and Accommodation Models

The Act offers language rights protections through two other provisions: section 2 and section 208. Section 2 is the Act's primary vehicle for anti-discrimination litigation and differs from the Act's structural language assistance remedies in several ways: it is a permanent provision of the Act, applies nationwide, and does not employ a statistical trigger as a prerequisite for coverage.<sup>65</sup> While section 2 protects members of language minority groups based on their group status—in other words, because they are of Spanish heritage or are Asian American, American Indian, or Native Alaskan—section 2 does not prohibit discrimination on the basis of limited-English ability or language usage per se. Section 2 has been employed, nonetheless, in recent anti-discrimination cases to obtain language-based remedies designed to assist limited-English

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Brenda Fathy Abdelall, Note, *Not Enough of a Minority?: Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911 (2005).

62. See JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 U. MIAMI L. REV. 1, 32-36 (2006).

63. See generally Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251 (2007) (discussing multiple weaknesses in language assistance provisions).

64. The language assistance provisions are also circumscribed because of constitutional limits on the powers of Congress to legislate remedial action. Recent U.S. Supreme Court case law has checked congressional authority under section 5 of the Fourteenth Amendment to ensure that legislative responses are fully documented and form a congruent and proportional response to constitutional violations. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); City of Boerne v. Flores, 521 U.S. 507, 530 (1997); cf. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504 (2009) (declining to review constitutionality of provisions in section 5 of the Voting Rights Act). While the fact finding predicates for Congress's most recent reauthorizations of sections 4(f)(4) and 203 should readily satisfy constitutional standards, see James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507 (2008), adding coverage to new groups or extending remedies beyond documented needs could raise constitutional questions should Congress further amend the Act.

65. See Hernandez v. Woodard, 714 F. Supp. 963, 968-69 (N.D. Ill. 1989) (concluding that section 2 claims on behalf of language minorities need not be coupled with section 203's statistical prerequisites).

proficient voters.<sup>66</sup>

In *United States v. City of Hamtramck*, for instance, the Department of Justice asserted multiple section 2 violations arising from racial discrimination perpetrated by a government-approved citizen group who challenged the citizenship and voter qualifications of Arab American and darker-skinned Asian American voters.<sup>67</sup> During the course of the November 1999 election in Hamtramck, Michigan, over forty voters were confronted on the basis of physical appearance or because they had “Arab-sounding” names. As a core remedy, the *Hamtramck* consent decree required that officials be trained on proper procedures for addressing voter intimidation and challenging voter qualifications. The consent decree went further, however, and mandated that bilingual election inspectors be hired to assist in future elections and that notices be prepared in Arabic and in Bengali to inform voters about the new election practices.<sup>68</sup>

The development of language-based remedies in cases like *United States v. Hamtramck* suggests that section 2 could become a broader source of assistance for limited-English proficient voters even when the basis for the discrimination is race or membership in a language minority group. Section 2 also carries the advantage of being applicable to any jurisdiction, regardless of the size of a group’s population within the jurisdiction. However, section 2 litigation is limited by the infrequency of cases that are filed, and litigation-based remedies have inherent constraints because they require specific findings of discrimination and do not extend beyond the particular defendants bound by the case.

Section 208 differs from both section 2 and the Act’s structural language assistance provisions because it can be invoked by any limited-English proficient voter and is not confined to the Act’s definition of “language minorities.” Section 208 states in part that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.”<sup>69</sup> Originally designed as an accommodation measure for disabled voters, this section has been applied to limited-English proficient voters who require assistance to understand an English-only ballot.<sup>70</sup> Section 208 imposes no affirmative obligations on

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66. See, e.g., Complaint, United States v. Salem Cnty., No. 1:08-cv-03726-JHR-AMD (D.N.J. July 24, 2008); Amended Complaint, United States v. City of Phila., No. 2:06-4592 (E.D. Pa. April 26, 2007); Complaint, United States v. Long Cnty., No. CV206-040 (S.D. Ga. Feb. 8, 2006); Complaint, United States v. City of Bos., No. 05-11598 WGY (D. Mass. July 29, 2005); Complaint, United States v. City of Hamtramck, No. 00-73541 (E.D. Mich. Aug. 4, 2000).

67. Complaint, *Hamtramck*, No. 00-73541.

68. Consent Order and Decree, *Hamtramck*, No. 00-73541.

69. 42 U.S.C. § 1973aa-6 (2006). Section 208 contains an exception precluding an assistor who is “the voter’s employer or agent of that employer or officer or agent of the voter’s union.” *Id.*

70. The legislative history of section 208 highlights some of the parallels between disability and limited-English proficiency:

Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups

localities to provide language assistance, but it does allow an enforcement action if election officials impede or deny a voter's access to an assistor.<sup>71</sup>

Section 208 has the potential to be a far-reaching mechanism for enforcing language rights under the Voting Rights Act because it applies nationwide and enables any limited-English proficient voter to receive assistance in voting.<sup>72</sup> Section 208 also allows personalized aid because the voter determines who will provide the assistance and what will be needed to cast a meaningful vote. A major problem with the law, however, is that it establishes no standards on the quality of assistance provided to the voter, nor does it impose significant obligations on federal, state, or local governments. The costs are borne almost entirely by the private assistor and the affected voter, who also carries the responsibility of arranging the assistance in the first place. Election officials primarily assume costs for training staff to prevent violations of the law, such as denying or interfering with assistors; localities bear no real costs in providing aid to voters.

Read together, the various sections of the Voting Rights Act offer a mix of language rights tools with significant gaps—both in theory and in practice. The “language minority” definition delimits the structural remedies of the Act, but basic barriers persist for voters whose language groups fail to satisfy the Act’s triggers or who fall outside the basic definitions needed for coverage. Litigation under section 2 offers only piecemeal remedies, and the personal assistance

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include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.

S. REP. NO. 97-417, at 53 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 240, 1982 WL 25033.

71. See, e.g., Consent Decree, Judgment, and Order, United States v. Fort Bend Cnty., No. 4:09-cv-1058 (S.D. Tex. Apr. 13, 2009); Settlement Agreement, *City of Phila.*, No. 06-4592; Revised Agreed Settlement Order, United States v. City of Springfield, No. 06-301-23-MAP (D. Mass. Sept. 13, 2006); Consent Decree, Judgment, and Order, United States v. Brazos Cnty., No. H-06-2165 (S.D. Tex. June 27, 2006); Order, United States v. Berks Cnty., No. 03-CV-1030 (E.D. Pa. Aug. 20, 2003); United States v. Miami-Dade Cnty., No. 02-21698 (S.D. Fla. June 7, 2002). In *United States v. Miami-Dade County*, for example, Haitian American voters who needed assistance in Creole were denied the use of assistors, and even when assistance was allowed, it was often limited to demonstrations of voting procedures outside the voting booth. Consent Order at 2, *Miami-Dade Cnty.*, No. 02-21698. The consent decree’s requirements included training programs for poll workers, voter education policies, and the employment of Creole-speaking election employees in targeted precincts. *Id.* at 5. Haitian Americans are covered by section 208 even though they fall outside the Act’s formal definition of language minorities.

72. See Terin M. Barbas, Note, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 FLA. ST. U. L. REV. 189, 204-08 (2009) (suggesting that amending section 208 would provide an optimal solution to meeting language assistance needs).

available to voters under section 208 offers a weak form of accommodation that relieves local election officials of any significant role. As the next Part illustrates, several states and local governments have taken a more active role in providing language assistance and have implemented measures to bridge the gaps in federal law.

## II. STATE AND LOCAL LANGUAGE ASSISTANCE POLICIES

Because of the constraints of the Act, many limited-English proficient voters continue to face language barriers in the electoral process. A number of state and local governments have developed language access policies to address voter needs, but the responses vary widely. Some policies simply require compliance with the Act<sup>73</sup> or parallel federal law,<sup>74</sup> while others have gone beyond the Act's requirements to extend assistance to multiple language groups. State and local policies have arisen in a variety of contexts: as responses to federal litigation under the Act, as additions to extant requirements under section 203, and as policy initiatives where few or no federal mandates are in place.

### A. Federal Litigation and Local Remedies

A number of recent lawsuits have served as catalysts for local policies that extend language assistance beyond the requirements of the Act. For instance, *United States v. San Diego County* involved multiple violations of section 203 arising out of San Diego County's inadequate language assistance to Latino and Filipino American voters, which included "failing to provide an adequate pool of bilingual poll officials . . . failing to make available . . . election-related announcements, instructions, and notices at election sites . . . [and] failing to translate . . . election-related information" on the registrar of voters' website.<sup>75</sup> The settlement between the federal government and the county included a common set of remedies in section 203 litigation: translating election materials,

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73. See, e.g., FLA. STAT. ANN. § 101.2515 (West, Westlaw through 2010 2d Reg. Sess.); LA. REV. STAT. ANN. § 18:106(D) (West, Westlaw through 2009 Reg. Sess.); R.I. GEN. LAWS ANN. § 17-19-54 (West, Westlaw through Ch. 319 of Jan. 2010 Sess.); S.D. CODIFIED LAWS § 12-3-6 (2010); see generally Brian J. Sutherland, *The Patchwork of State and Federal Language Assistance for Minority Voters and a Proposal for Model State Legislation*, 65 N.Y.U. ANN. SURV. AM. L. 323, 339-45 (2009).

74. Several state laws offer voter assistor guarantees comparable to the provisions contained in section 208 of the Voting Rights Act. See, e.g., COLO. REV. STAT. § 1-7-112(1)(a) (LEXIS through 2010 legislation); GA. CODE ANN. § 21-2-409(a) (2010); 10 ILL. COMP. STAT. ANN. 5/17-14 (West, Westlaw through 2010 Reg. Sess.); KAN. STAT. ANN. § 25-2909(a) (2000 & Supp. 2009); MASS. GEN. LAWS ANN. ch. 54, § 79 (West, Westlaw through Ch. 347 of 2010 2d Ann. Sess.); TEX. ELEC. CODE ANN. § 64.031 (West, Westlaw through 2009 legislation); WIS. STAT. ANN. § 6.82(2)(a) (West, Westlaw through 2009 Act 406); see generally Sutherland, *supra* note 73, at 346-51.

75. Complaint at 4, *United States v. San Diego Cnty.*, No. 04-CV-1273IEG (S.D. Cal. June 23, 2004), available at 2004 WL 5690558.

hiring bilingual poll workers, distributing multilingual information, hiring a language-assistance coordinator, and creating a community-based advisory body for each language.<sup>76</sup>

Particularly noteworthy in the *San Diego County* case, however, was the voluntary inclusion of Vietnamese language assistance in the consent decree, paralleling the terms of the Spanish and Filipino requirements imposed on San Diego County. The memorandum of agreement stated that “the 2000 Census also showed a Vietnamese-speaking voting age population with limited-English proficiency of [9915], or only 85 below the 10,000 person statutory threshold, and San Diego County wishes to serve this growing community.”<sup>77</sup> Immediately after the county’s implementation of the settlement agreement, the effects of the language assistance were significant: Spanish and Filipino registration increased by more than 21% during the six-month period after the resolution of the lawsuit, and Vietnamese registration increased by more than 37%.<sup>78</sup> Moreover, even though the settlement agreement expired on March 31, 2007, and San Diego County was no longer obligated to provide Vietnamese language assistance, election officials continued to provide assistance in all three languages.<sup>79</sup>

In *United States v. City of Boston*, the Department of Justice asserted multiple violations of the Act and other federal laws by city election workers: treating limited-English proficient Latino, Chinese American, and Vietnamese American voters disrespectfully; refusing to permit voters to be aided by an assist; improperly influencing, coercing, or ignoring voters’ ballot choices; and refusing or failing to provide provisional ballots.<sup>80</sup> The complaint alleged violations of section 203, but only with respect to Spanish-speaking voters; the Chinese and Vietnamese populations were not large enough to trigger section 203 coverage.<sup>81</sup> Nevertheless, the remedies in the consent decree included guarantees

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76. Memorandum of Agreement at 2-10, *San Diego Cnty.*, No. 04-CV-1273IEG.

77. *Id.* at 2.

78. See H.R. REP. NO. 109-478, at 12 (2006), available at 2006 WL 1403199. Anecdotal evidence also supports the importance of language assistance in promoting voter participation. A former chief of the Department of Justice’s voting section relayed the following anecdote from San Diego County: “A Vietnamese voter, thrilled to find a Vietnamese-speaking poll worker, exclaimed that ‘America is the greatest country in the world! I’m going to tell everyone!’ The voter later brought more Vietnamese voters to the polls.” John Tanner, *Federal Enforcement of the Language Assistance Provisions*, in TUCKER, *supra* note 45, at 317-18.

79. Because of the numbers (the 2000 census showed the Vietnamese population just a few citizens short of the 10,000 benchmark, and the population is highly likely to satisfy the benchmark under 2010 census data), the county may simply have been anticipating the inevitable. However, the timing of the settlement, occurring eight years prior to the imposition of federal mandates in 2012, suggests that the county was engaging in good faith efforts to satisfy local goals of serving the Vietnamese American community, and not simply to comply early with federal law.

80. Complaint at 4-6, *United States v. City of Bos.*, 497 F. Supp. 2d 263 (D. Mass. 2007) (No. 05-11598-WGY).

81. Chinese American voting-age citizens in Boston numbered 9825; Vietnamese American voting-age citizens numbered 4220. *Id.* at 3.

of language assistance to all three groups.<sup>82</sup> The inclusion of Vietnamese language assistance was especially notable because the target population of Vietnamese Americans was only 4220, less than half the number needed to trigger section 203 coverage.

The *City of Boston* litigation parallels the *San Diego County* litigation in several ways, with a variety of language assistance remedies that expanded the city's efforts to recruit bilingual Chinese and Vietnamese poll workers for targeted precincts. Implementation of multilingual assistance has been more convoluted in Boston, however, because of state and local politics following the expiration of the consent decree in 2008. In 2007, both the Department of Justice and community groups advocating multilingual assistance supported the translation of the candidates' names on ballots into Chinese through "transliteration," a procedure by which names are converted phonetically from their alphabetic spelling to Chinese characters.<sup>83</sup> The Massachusetts Secretary of the Commonwealth opposed transliteration, however, and a federal court declined to rule that transliteration was required under the settlement agreement.<sup>84</sup> The Boston City Council later voted to pursue a home-rule petition to continue Chinese and Vietnamese language assistance in federal and state elections.<sup>85</sup> State legislation to implement the home-rule petition was eventually enacted in 2010, establishing requirements that the City of Boston provide Chinese assistance (including transliteration) and Vietnamese assistance beginning in 2011.<sup>86</sup>

#### *B. Near-Coverage and Anticipatory Compliance*

The *City of San Diego* and *City of Boston* lawsuits illustrate how the institutional power of the Act, coupled with federal enforcement and local advocacy, can lead jurisdictions to expand language assistance efforts.<sup>87</sup> Short

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82. Memorandum of Agreement and Settlement at 3, *City of Bos.*, 497 F. Supp. 2d 263.

83. See Frank Phillips, *Ballot Translations Could Mean Too Much*, BOS. GLOBE, June 26, 2007, at A1; Andrea Stone, *Candidates Lost in Chinese Translation*, USA TODAY, July 11, 2007, at A3.

84. See Order, *City of Bos.*, 497 F. Supp. 2d 263; Frank Phillips, *Candidates' Names Won't Be Transliterated-Dispute Centered on Chinese Voters*, BOS. GLOBE, Aug. 8, 2007, at B2.

85. Maria Sacchetti, *Fresh Fight Over Bilingual Ballots; Council to Pursue State Law Ordering Names in Chinese*, BOS. GLOBE, May 14, 2008, at B1.

86. H.R. 4880, 186th Leg., 2d Ann. Sess. (Mass. 2010).

87. A parallel development is the maintenance of language assistance by a jurisdiction even when it is no longer required to provide assistance under federal law. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-81, BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS 15 (1997), available at <http://www.gao.gov/archive/1997/gg97081.pdf>. The City and County of San Francisco, for example, was first required to offer assistance in Chinese and Spanish in the 1970s, but it was not obligated under federal law to provide assistance in either language during the 1980s or in Spanish during the 1990s. Election officials continued to provide both Chinese and Spanish language assistance—including trilingual ballots—throughout the 1980s and 1990s. *Id.*

of litigation, a number of local governments have initiated coverage for large and politically influential language groups who missed coverage under the Act in one census cycle but were likely to be covered in the future. For example, during the 1990s, California's Santa Clara County was required under section 203 to provide assistance in Spanish, but in no other minority languages, even though the county contained one of the nation's largest concentrations of Southeast Asian immigrants and sizable populations of other Asian American groups. Assistance to Vietnamese American voters was a particular concern because the Vietnamese American figure for targeted voting-age citizens fell just short of the 10,000 numerical benchmark needed to trigger section 203 coverage.

Advocacy by local civil rights groups led to San Jose County to deploy multiple stages of language assistance. In 1993, the county voluntarily printed ballots translated into Vietnamese and mailed bilingual ballots to all voters who indicated that they had been born in Vietnam.<sup>88</sup> Following an assessment of needs and recommendations by a citizen advisory committee,<sup>89</sup> as well as the acknowledgement of "a swell of new citizens from mainland China, Hong Kong and Taiwan during the [previous] two years, and requests by those immigrants," the registrar of voters added Chinese language translations in 1996.<sup>90</sup> After the 2000 census, Santa Clara County was legally mandated under section 203 to provide assistance in Spanish, Vietnamese, Chinese, and Tagalog.

Similar developments transpired in Los Angeles County in the 1990s. Beginning in 1992, Los Angeles County was required to offer assistance in five languages: Chinese, Japanese, Spanish, Tagalog, and Vietnamese. The Korean language, however, was not included because the Korean American illiteracy rate—measured by completion of a fifth-grade education, not by English language proficiency—did not exceed the national average. The hurdle of a lower illiteracy rate was especially vexing for the local community because the target population of Korean Americans in Los Angeles County was more than double the number necessary to trigger section 203.<sup>91</sup> Unlike Santa Clara County, however, efforts to win voluntary assistance in Los Angeles County lasted several years, even though Korean Americans had a strong base of community advocates and numerous surveys demonstrated high rates of need and interest in Korean language assistance.<sup>92</sup> The county board of supervisors ultimately voted in September 1998 to begin printing election materials in

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After the 2000 census data determinations, both Chinese and Spanish were mandated under section 203 in San Francisco.

88. See Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 52 (2004).

89. See *id.*

90. Edwin Garcia, *Demand Rising for Non-English Voting Materials*, SAN JOSE MERCURY NEWS, Nov. 5, 1996, at 4B (quoting Elma Rosas Martinez, Spokeswoman, Office of Santa Clara Cnty. Registrar of Voters).

91. Magpantay, *supra* note 88, at 50 (noting that 1990 census data showed that a target population of 21,611 Korean American citizens resided in Los Angeles County).

92. *Id.*

Korean.<sup>93</sup> After the 2002 determinations of section 203 coverage, Los Angeles County was legally mandated to provide assistance in Korean.

Community efforts to gain voluntary assistance, however, are not always entirely successful. In 1995, the New York City Board of Elections agreed in response to local advocacy efforts to begin adding Korean language interpreters at selected precincts in Queens.<sup>94</sup> Nonetheless, the board declined to add written translations of materials into Korean. Despite strong community support for expanded language assistance, the board even resisted offers by Korean American community groups to help translate basic materials such as voter registration forms and voting machine instructions. A full complement of Korean language assistance in Queens was only added after the 2002 determinations of section 203 coverage.

### *C. State and Local Policy Initiatives*

Responding to community advocacy and the growth of immigrant populations, several states and cities have adopted language assistance policies that go beyond the coverage limits of the Act. States, counties, and larger cities typically have multiple language groups that receive varying levels of assistance based on the size of the language group, whereas smaller cities and suburbs may have immigrant enclaves composed of one or two ethnic groups requiring focused assistance. A number of local policies have concentrated on providing voter registration forms and other basic informational materials, which are available in print and on websites. Some localities have gone further by offering a range of services, including the translation of ballots and the recruitment of bilingual poll workers to assist limited-English proficient voters in targeted precincts.

1. *State Laws and Practices.*—A number of states have adopted laws and policies that are more generous than the Act in extending assistance to language groups.<sup>95</sup> Maine, for instance, offers ballot instructions in French to voters who request the translated materials from local election officials.<sup>96</sup> Over 5% of Maine's population speaks French, and the state has a history of past discrimination involving Francophone immigrants from Canada.<sup>97</sup> Other states offer assistance based on statistical formulas that trigger coverage at a lower level than section 203 of the Act. In California, state law requires that in counties where 3% of the voting-age citizens "lack sufficient skill in English to register without assistance," county officials must make reasonable efforts to

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93. *Supervisors Move to Publish Voter Booklets in Korean*, L.A. TIMES, Sept. 16, 1998, at 4B.

94. See Magpantay, *supra* note 88, at 52.

95. See Sutherland, *supra* note 73, at 352-62.

96. See ME. REV. STAT. ANN. tit. 21-A, § 603(5) (West, Westlaw through 2009 2d Reg. Sess.).

97. See Pam Belluck, *Long Scorned in Maine, French Has Renaissance*, N.Y. TIMES, June 4, 2006, at 1.26.

recruit voting registrars who are fluent in the language.<sup>98</sup> A similar trigger applies to the recruitment of bilingual election officials for non-English-speaking citizens who need assistance in voting.<sup>99</sup> In North Carolina, which currently has no section 203 coverage within the state, any county or municipality whose Latino population is at least 6% of the population must print and distribute Spanish language ballot instructions.<sup>100</sup> The statistical trigger is notably generous because it is based on the total population of Latinos in a county or municipality, not just the population of limited-English proficient voting-age citizens.

Extended assistance has also been legislated through more expansive definitions of language groups than the Act's definition of "language minority."<sup>101</sup> For example, in the District of Columbia, which currently has no section 203 obligations, a broader definition of "non-English-speaking person" is employed to include anyone "whose native speaking language is a language other than English, and who continues to use his or her native language as his or her primary means of oral and written communication."<sup>102</sup> The District goes on to require written language assistance in election wards where non-English-speaking persons are 5% or more of the voting population, and it allows the D.C. Board of Elections and Ethics to establish language assistance in wards with lower percentages of non-English-speaking persons.<sup>103</sup>

As matters of agency practice, secretaries of state and other state election administrators have voluntarily offered basic informational services and materials in non-English languages. California's secretary of state, for example, offers

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98. CAL. ELEC. CODE § 2103(c)-(d) (2009). The subsections state in pertinent part:

(c) It is also the intent of the Legislature that non-English-speaking citizens, like all other citizens, should be encouraged to vote. Therefore, appropriate efforts should be made to minimize obstacles to registration by citizens who lack sufficient skill in English to register without assistance.

(d) Where the county elections official finds that citizens described in subdivision (c) approximate 3 percent or more of the voting age residents of a precinct, or in the event that interested citizens or organizations provide information which the county elections official believes indicates a need for registration assistance for qualified citizens described in subdivision (c), the county elections official shall make reasonable efforts to recruit deputy registrars who are fluent in a language used by citizens described in subdivision (c) and in English.

99. *Id.* § 12303(b)-(c).

100. N.C. GEN. STAT. § 163-165.5A (LEXIS through 2009 Reg. Sess.).

101. See, e.g., COLO. REV. STAT. § 1-2-202(4) (LEXIS through 2010 legislation) (requiring the county clerk and recorder to recruit bilingual staff members if 3% trigger for non-English-speaking electors is met); D.C. CODE § 1-1031.01 (2010) (defining "non-English-speaking" as "a person whose native speaking language is a language other than English, and who continues to use his or her native language as his or her primary means of oral and written communication"); N.J. REV. STAT. § 19:12-7.1(b) (2010) (requiring voter notices to be printed in any language other than English if 10% trigger is met).

102. D.C. CODE § 1-1031.01.

103. *Id.* § 1-1031.02(b).

telephonic assistance and written materials (voter registration forms, voter guides, and ballot-by-mail applications) in six languages: Chinese, Japanese, Korean, Spanish, Tagalog, and Vietnamese.<sup>104</sup> The state as a whole is only bound by federal law to provide assistance in Spanish. In the State of Washington, which has three counties covered for Spanish and one county covered for Chinese under section 203,<sup>105</sup> the secretary of state offers voter registration and voter informational materials in seven non-English languages: Cambodian, Chinese, Korean, Laotian, Russian, Spanish, and Vietnamese.<sup>106</sup> Minnesota similarly offers voter registration materials in five non-English languages—Hmong, Russian, Somali, Spanish, and Vietnamese—even though neither the state nor any of its political subdivisions triggers section 203 coverage and neither Russian nor Somali falls within the “language minority” definition of the Act.<sup>107</sup> Furthermore, several state election offices offer websites<sup>108</sup> that link to the language assistance website of the U.S. Election Assistance Commission, which offers national voter registration forms in Spanish and five Asian languages.<sup>109</sup>

Secretaries of state have also engaged in significant outreach and education efforts to increase voter participation. For example, in Connecticut, where Spanish-language assistance is required in a number of urban counties under section 203, the secretary of state engaged in an extensive voter outreach and registration campaign in 2008 to increase the number of Latino registered voters statewide. The “¡Tu Voto Sí Cuenta!” (“Your Vote Does Count!”) program included an aggressive Spanish-language media campaign and translated voter education materials on the use of paper ballots with new optical scan technology and on proper forms of identification for registering and voting. The “¡Tu Voto

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104. See *Multilingual Voter Services*, CAL. SEC’Y OF STATE, [http://www.sos.ca.gov/elections/elections\\_multi.htm](http://www.sos.ca.gov/elections/elections_multi.htm) (last visited Oct. 17, 2010).

105. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,877 (July 26, 2002).

106. *Elections & Voting*, WASH. SEC’Y OF STATE, <http://www.sos.wa.gov/elections> (last visited Oct. 17, 2010).

107. See *Voting Information in Other Languages*, MINN. SEC’Y OF STATE, <http://www.sos.state.mn.us/index.aspx?page=638> (last visited Oct. 17, 2010). Voting instructions at polling sites were first offered in Minnesota in 2002 in three languages: Hmong, Somali, and Spanish. See *Citizen Outreach Advisory Taskforce Urges New Citizens to Vote*, ASIAN PAGES, Nov. 14, 2002, at 6, available at 2002 WLNR 11553301.

108. See, e.g., *Elections Division*, SEC’Y OF MASS., <http://www.sec.state.ma.us/ele> (last visited Oct. 17, 2010); *Forms and Publications*, VA. STATE BD. OF ELECTIONS, [http://www.sbe.virginia.gov/cms/Forms\\_Publications/Index.html](http://www.sbe.virginia.gov/cms/Forms_Publications/Index.html) (last visited Oct. 17, 2010); *National and N.C. Voter Registration Forms*, N.C. STATE BD. OF ELECTIONS, <http://www.sboe.state.nc.us/content.aspx?id=48> (last visited Oct. 17, 2010); *Voter Registration*, R.I. BD. OF ELECTIONS, <http://www.elections.ri.gov/voting/registration.php> (last visited Oct. 17, 2010).

109. See *Register to Vote*, U.S. ELECTION ASSISTANCE COMM’N, [http://www.eac.gov/voter\\_resources/register\\_to\\_vote.aspx](http://www.eac.gov/voter_resources/register_to_vote.aspx) (last visited Oct. 17, 2010) (making available registration forms in Chinese, English, Japanese, Korean, Spanish, Tagalog, and Vietnamese).

*Sí Cuenta!*" project registered over 21,000 new voters, more than double the original goal of the campaign.<sup>110</sup>

2. *Local Policies and Practices.*—A wide range of voluntary policies and practices also exists at the county and city levels. Among the most common efforts are recruitment and hiring of bilingual staff to serve as poll workers in targeted districts. For example, several jurisdictions provided voluntary assistance to Asian American voters through bilingual interpreters and poll workers during the November 2008 elections as follows: Chicago hired election judges who spoke Gujarati, Hindi, Korean, Tagalog, Urdu, and Vietnamese; New Orleans hired Vietnamese interpreters and election commissioners; Lowell, Massachusetts hired Khmer and Vietnamese interpreters; Quincy, Massachusetts hired Chinese and Vietnamese poll workers; Middlesex, New Jersey appointed Chinese, Gujarati, and Hindi-speaking poll workers; and Philadelphia appointed Chinese, Khmer, Korean, and Vietnamese interpreters.<sup>111</sup>

Another common practice is providing translated voter registration forms and basic voter information materials. In the City of Cambridge, Massachusetts, which is not covered by section 203 in any language, voter registration materials are available in English and eight other languages: Arabic, Chinese, Haitian Creole, Korean, Portuguese, Russian, Spanish, and Vietnamese.<sup>112</sup> In Washington's King County, which includes Seattle and is only required under section 203 to provide assistance in Chinese, voter registration materials are also available in Cambodian, Korean, Laotian, Russian, Spanish, and Vietnamese.<sup>113</sup> And although Los Angeles County is required to provide language assistance in Spanish and five Asian languages, it also offers a voter information brochure that is translated into Armenian, Khmer, and Russian.<sup>114</sup>

A variation on these local policies is the law enacted in New York to require Russian-language assistance in New York City, where there were over 243,000 individuals of Russian ancestry living in the year 2000.<sup>115</sup> The state legislation

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110. See JOCELYN F. BENSON, STATE SECRETARIES OF STATE 93-94 (2010); Press Release, Susan Bysiewicz, Sec'y of the State of Conn., Bysiewicz: More Than 21,000 Latinos Become Newly Registered Voters During ¡Tu Voto *Sí Cuenta!* Campaign (Oct. 29, 2008), available at [http://www.sots.ct.gov/sots/lib/sots/releases/2008/10.29.08\\_tu\\_voto\\_si\\_cuenta\\_a\\_success.pdf](http://www.sots.ct.gov/sots/lib/sots/releases/2008/10.29.08_tu_voto_si_cuenta_a_success.pdf)(last visited Oct. 17, 2010).

111. See *Lessons Learned from the 2008 Election: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 93 (2009) (testimony of Glenn D. Magpantay, Staff Attorney, Asian Am. Legal Defense & Educ. Fund).

112. See *Voter Registration*, CITY OF CAMBRIDGE ELECTION COMM'N, <http://www.cambridgema.gov/ELECTION/ProgramsServices.cfm> (last visited Oct. 17, 2010).

113. See *Voter Registration*, KING CNTY. ELECTIONS, <http://www.kingcounty.gov/elections/registration.aspx> (last visited Oct. 17, 2010).

114. See L.A. CNTY. REGISTRAR-RECORDER/CNTY. CLERK, <http://www.lavote.net> (last visited Oct. 17, 2010).

115. See QT-P13. *Ancestry: 2000, New York City, New York*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow "DATA SETS" hyperlink, select "Census 2000 Summary File 3," and follow "Enter a table number" hyperlink; search "QT-P13" and follow "Go" hyperlink;

requires Russian-language assistance in every city in the state that has a population exceeding one million people, which currently applies only to New York City.<sup>116</sup> The law requires that the New York City Board of Elections provide information in Russian on its website and that the board produce and disseminate Russian-language booklets containing voter registration, absentee ballot instructions, and general voter information citywide.<sup>117</sup>

Providing focused language assistance to an immigrant group that comprises a sizable portion of a city's population is a recurring theme in local policymaking. For example, Florida's Miami-Dade County has required assistance in Creole to the local Haitian American community since 2000. Because it contains one of the largest Cuban American communities in the country, Miami-Dade has been required under section 203 to provide Spanish-language assistance since the mid-1970s. The Haitian American population has become a major segment of South Florida's population as well, driven by the migration of refugees and other immigrants from Haiti since the 1970s. According to 2000 census data, the Haitian American population in Miami-Dade County numbered over 95,000 and constituted 4.2% of the county's population.<sup>118</sup>

In 1999, the Miami-Dade Board of County Commissioners unanimously passed an ordinance which requires Creole translations to be posted in voting booths, that publicity be generated in appropriate Creole-language media, and, as appropriate, that ballots be translated into Creole.<sup>119</sup> When extensive problems

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select ".... Place" under "Select a geographic type," then select "New York" and then "New York city"; follow "Add" hyperlink, then follow "Show Result" hyperlink) (last visited Oct. 17, 2010).

116. Since the population of the state's next largest city, Buffalo, was less than 300,000 in the year 2000, it is unlikely that any other city will be covered in the near future.

117. N.Y. ELEC. LAW § 3-506 (McKinney 2009 & Supp. 2010). The section states:

A board of elections in a city of over one million shall provide the same information in Russian that it provides in languages other than English on its website. It shall also produce and disseminate citywide a booklet that includes: (a) a voter registration form in English with instructions in Russian; (b) instructions in Russian regarding the criteria and application process for obtaining an absentee ballot; and (c) a section with general voter information in Russian including frequently asked questions. Such board may include other languages on its website and in such booklet.

118. See *QT-P13 Ancestry: 2000, Miami-Dade County, Florida*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow "DATA SETS" hyperlink, select "Census 2000 Summary File 3," and follow "Enter a table number" hyperlink; search "QT-P13" and follow "Go" hyperlink; select ".... County" under "Select a geographic type," then select "Florida" and then "Miami-Dade County"; follow "Add" hyperlink, then follow "Show Result" hyperlink) (last visited Oct. 17, 2010).

119. MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES § 12-16 (1999). The ordinance states:

(a) In those precincts in which the Supervisor of Elections determines that a significant portion of the electorate is Haitian-American, the Supervisor of Elections shall provide voting booths containing Creole translations in addition to booths containing Spanish translations.

with voter assistance arose during the November 2000 election, the Department of Justice initiated a lawsuit under section 208's assistors provisions because Haitians are not a language minority group under section 203. The 2002 consent decree bolstered the original Miami-Dade language assistance policies by adding requirements that local officials engage in best efforts to assign bilingual poll workers to assist Haitian voters in appropriate precincts and make multilingual ballots available at every polling place in the County.<sup>120</sup> Nearby Palm Beach County followed Miami-Dade's lead and began providing language assistance in Creole in 2002; Broward County added Creole assistance in 2008.<sup>121</sup>

Another important site for voluntary language assistance has been Southern California, where several cities in the region have a major immigrant group that forms a significant and politically active segment of the population. Among the first cities to provide language assistance to groups falling outside of the Act's mandatory coverage was Monterey Park, whose city council first voted to print election materials in Chinese and Spanish in 1991.<sup>122</sup> The Chinese American population has been a significant political bloc within Monterey Park since the 1980s; at the time, it constituted 36% of the city's population of over 60,000.<sup>123</sup> Chinese American community activists played a key role in the enactment of the local policy, which was seen as an important tool for incorporating local immigrant populations into the political process.<sup>124</sup> As one local advocate commented to the press, "This is a process through which we can bring (immigrants) into the mainstream of America . . . to bring the old and new

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- (b) In those elections in which the Supervisor of Elections determines that it is appropriate to provide ballots in Creole, those ballots shall be advertised in a Creole language newspaper selected by the Supervisor of Elections.
  - (c) The provisions of this ordinance shall apply only to ballots provided at voting booths in the precincts described in subsection (a) hereof and shall apply only to county-wide elections and other appropriate elections as determined by resolution of the Board of County Commissioners.
  - (d) The provisions of this section shall become operative only upon a written finding provided to this Board by the Supervisor of Elections that a certified Creole translator exists who can perform the translations mandated by this section.

The board of county commissioners subsequently passed a resolution directing the supervisor of elections to identify precincts in Homestead and Florida City with significant Haitian populations and to prepare ballots for those precincts. See MIAMI-DADE CNTY., FLA., RES. R-296-00 (2000).

120. Consent Order at 6, United States v. Miami-Dade Cnty., No. 02-21698 (S.D. Fla. June 17, 2002); see JoNel Newman, *Ensuring That Florida's Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 361-62 (2007).

121. See Alva James-Johnson, *Creole Ballots on Course for '08: Elections Officials Aim to Lure More Haitian-American Voters to Polls*, S. FLA. SUN-SENTINEL, Apr. 7, 2007, at 1B.

122. Irene Chang, *City Ballots in Chinese, Spanish Are Approved*, L.A. TIMES, Dec. 12, 1991, at J2.

123. *Id.*

124. *Id.*

together.”<sup>125</sup> Sam Kiang, the mayor of Monterey Park who sponsored the measure, added, “This is something that will encourage more participation in the democratic system.”<sup>126</sup>

Similar policies have developed in Southern California cities with substantial immigrant populations, including Beverly Hills and its large Iranian American community that forms approximately one-quarter of the city’s population.<sup>127</sup> In the year 2000, Russian Americans made up nearly 14% of West Hollywood’s population of over 35,000;<sup>128</sup> Armenian Americans constituted nearly 28% of Glendale’s population of nearly 200,000;<sup>129</sup> and over 20,000 Cambodian Americans—the largest Cambodian community in the United States—formed a sizable portion of Long Beach’s population of over 460,000.<sup>130</sup> Each of these cities has relied on bilingual poll workers for several years, and each city offers website information and printed election materials in the relevant languages. These cities also offer fully translated sample ballots for local elections.<sup>131</sup> Additionally, they offer a variety of non-electoral municipal services in the targeted language and provide opportunities for participation in the governance of the city. For example, West Hollywood has employed a bilingual Russian outreach coordinator since the mid-1990s and since 2000 has utilized a Russian

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125. *Id.*

126. *Id.*

127. See *supra* notes 1-9 and accompanying text.

128. See *QT-P13 Ancestry: 2000, West Hollywood City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 3,” and follow “Enter a table number” hyperlink; search “QT-P13” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “West Hollywood city”; follow “Add” hyperlink, then follow “Show Result” hyperlink) (last visited Oct. 17, 2010).

129. See *QT-P13 Ancestry: 2000, Glendale City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 3,” and follow “Enter a table number” hyperlink; search “QT-P13” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “Glendale city”; follow “Add” hyperlink, then follow “Show Result” hyperlink) (last visited Oct. 17, 2010).

130. See *DP-1 Profile of General Demographic Characteristics: 2000, Long Beach City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 2” and follow “Enter a table number” hyperlink; search “DP-1” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “Long Beach city”; follow “Add” hyperlink, then follow “Show Result” hyperlink; follow “Population Groups” hyperlink under “Quick Tables”; select “. . Cambodian alone or in any combination,” then follow “Add” and “Show Result” hyperlinks) (last visited Oct. 17, 2010).

131. See *Election Home Page*, CITY OF LONG BEACH CITY CLERK, <http://www.longbeach.gov/cityclerk/elections/default.asp> (last visited Oct. 17, 2010); *Election Results*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=83> (last visited Oct. 17, 2010); *City of Glendale, CA Election Info*, GLENDALE VOTES, <http://www.glendalevotes.org> (last visited Oct. 17, 2010).

advisory board that makes policy recommendations to the city council.<sup>132</sup>

Larger cities and counties typically have multiple immigrant populations whose needs are addressed through a range of policies. Chicago, for example, has provided voting assistance in several languages in recent years and employs a tiered approach to language assistance tied to the relative sizes of its limited-English-speaking populations. As the major city within Cook County, Chicago is required under section 203 to provide language assistance in Chinese and Spanish. The Chicago Board of Election Commissioners offers several accommodations: a website that has fully translated versions in three languages other than English (Chinese, Polish, and Spanish); oral assistance in these three languages through dedicated telephone lines; and voter registration forms in the three languages plus Korean.<sup>133</sup> In addition, the city provides a set of basic voter information materials in Arabic, Assyrian, Bosnian, Croatian, Gujarati, Korean, Romanian, Russian, Serbian, Tagalog, Urdu, and Vietnamese, and it recruits bilingual election judges to cover these languages.<sup>134</sup>

The City of Minneapolis offers voluntary assistance in multiple languages—Hmong, Somali, and Spanish—and has taken a broader approach to language assistance that considers translations and oral assistance provided by local government as a whole. Under a city council resolution passed in 2003, a citywide limited-English proficiency plan was developed the following year to create strategies for assisting multiple language groups in the city.<sup>135</sup> The city clerk later developed a separate plan addressing language assistance for local voters, including the recruitment and hiring of bilingual poll workers.<sup>136</sup> The language assistance available to limited-English proficient voters in Minneapolis is not as extensive as in some other cities, but the integration of voting assistance with other city services has promoted a number of benefits, such as coordinated translations of services in Hmong, Somali, and Spanish through specialized telephone lines and the city's website.<sup>137</sup>

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132. See *Russian Outreach*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=869> (last visited Oct. 17, 2010).

133. See BD. OF ELECTION COMM'RS FOR THE CITY OF CHI., <http://chicagoelections.com> (last visited Oct. 17, 2010).

134. See *id.*

135. See CITY OF MINNEAPOLIS, MINNEAPOLIS IN ANY LANGUAGE: POLICIES AND PROCEDURES TO ENSURE EQUAL ACCESS TO CITY SERVICES FOR PEOPLE WITH LIMITED ENGLISH PROFICIENCY 3, 3 (Nov. 2004) [hereinafter MINNEAPOLIS IN ANY LANGUAGE], available at [http://www.ci.minneapolis.mn.us/policies/MplsLEP\\_Plan.pdf](http://www.ci.minneapolis.mn.us/policies/MplsLEP_Plan.pdf) (last visited Oct. 17, 2010).

136. See CITY OF MINNEAPOLIS, CITY CLERK'S DEP'T 2007-2011 BUSINESS PLAN 12 (2006), available at [http://www.ci.minneapolis.mn.us/results-oriented-minneapolis/docs/CityClerkBusinessPlan\\_2007.pdf](http://www.ci.minneapolis.mn.us/results-oriented-minneapolis/docs/CityClerkBusinessPlan_2007.pdf) (last visited Oct. 17, 2010).

137. See *Elections & Voter Registration*, CITY OF MINNEAPOLIS, <http://www.ci.minneapolis.mn.us/ elections> (last visited Oct. 17, 2010).

*D. Patterns, Problems, and Effective Practices*

Each state and local government that engages in language assistance has a nuanced legal and political environment, and I have made no attempt to engage in a detailed political investigation, whether through case studies or quantitative data analyses, that might provide deeper insights into the formation of local policies. Yet it is clear from a cursory analysis that legal, institutional, and interest group pressures, as well initiatives of state and local election officials, have affected the expansion of voluntary language assistance across governmental bodies. Many of the jurisdictions that have provided voluntary services to a language group that is not covered by section 203 have also been required to provide mandatory language assistance to at least one group that is covered by the Act. Indeed, several jurisdictions only began engaging in voluntary language assistance because of the Act's federal requirements, and community-based advocacy has been essential to spur localities to expand language assistance to other groups.

Institutional pressures stemming from the enforcement of other federal anti-discrimination laws have also played a role in local governments' adoption of language assistance policies. Title VI of the Civil Rights Act of 1964 prohibits national origin discrimination by recipients of federal funding, and along with its implementing regulations, mandates that recipients provide language accessibility. Accordingly, state and local governments receiving federal funds have taken steps to assist limited-English proficient individuals in a wide range of governmental services. The Minneapolis language access plan, for example, makes clear that Title VI and its implementing regulations form the legal backbone of the city's provision of services to limited-English proficient citizens, and that federal law requires Minneapolis to "provide meaningful access to services for city residents with limited English."<sup>138</sup>

It is also clear that state and local policies provide tangible benefits to limited-English proficient voters and that these benefits can be especially useful for language groups whose voters fall outside the coverage of the Act's language assistance provisions. Some of the policies, such as the procedures used in Chicago, are particularly revealing because they show that there can be variations in assistance to multiple groups depending on size and needs. These policies offer more flexibility than the Act's mandates, which guarantee no assistance to groups that do not satisfy the Act's statistical triggers. The policies are also instructive because they show that some cities, such as West Hollywood and Minneapolis, are adopting more comprehensive measures to address the needs of limited-English proficient individuals. In those cities, language assistance in voting is one of several governmental services in which translations and other types of assistance are employed to eliminate barriers to civic participation.

Nevertheless, there are weaknesses in many of these state and local policies. Despite large immigrant communities within their boundaries, some cities and counties have been resistant to providing a full array of language assistance

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138. See MINNEAPOLIS IN ANY LANGUAGE, *supra* note 135, at 10.

measures. Queens County in New York offered poll worker assistance in Korean in the mid-1990s, but written translations were not available until several years later. Los Angeles County similarly delayed providing written language assistance in Korean until 1998. The New York City Board of Elections and local officials did not originally support Russian-language assistance prior to the passage of a state law in 2009.<sup>139</sup> This legislation was necessary to require the development of Russian materials, and the law only requires the board to develop basic informational materials, not to provide oral assistance or fully translated ballots.

Moreover, the standards for many forms of voluntary assistance are not consistent, and local requirements are often less rigorous than the mandates of the Act. State and local policies may lack clear triggering mechanisms to determine when language assistance should be provided in the first place, and although some local governments have developed tiers of services for multiple language groups, they do not necessarily articulate the numerical criteria used to differentiate among language groups. State and local election policies may also lack the enforcement machinery, such as private rights of action and civil rights offices charged with administrative or litigation powers, that are available under federal civil rights laws.

Local demographics and politics vary significantly, but optimal legislation can draw on both federal compliance standards and leading practices at the state and local levels. For example, in response to weaknesses in federal and state law, Brian Sutherland has proposed model state legislation that attempts to address problems arising in the current constellation of election policies. Among the recommendations are the following: (1) creating an office of minority language assistance within the state's chief election official's office; (2) developing structural solutions to coverage formula problems, such as delegating authority for coverage determinations to appropriate agencies; (3) establishing relaxed statistical triggers for minority group coverage; (4) employing annual or biennial coverage determinations to address demographic changes; (5) amending state assistors laws to be consistent with section 208; and (6) drawing on the Act's enforcement structures to create parallel programs at the state level.<sup>140</sup>

Localities can also go further by providing a sliding scale of interpreter services and written translations based on group size and need. Costs must be considered in setting any language assistance standards, but addressing voters' needs may not be unduly burdensome if an appropriate range of mechanisms is in place. For instance, cities such as Cambridge and Chicago have opted to focus on voter registration and voter information pamphlets to provide the widest array of language assistance through translated forms—eight languages in Cambridge, fifteen in Chicago. Similarly, the recruitment of bilingual poll workers is a widespread practice that can cover a multitude of languages, and, if done strategically, without large additional costs. More extensive services paralleling

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139. See Walter Ruby, *Bloomberg Blamed for Russian Ballot Failure*, JEWISH WK. (July 27, 2007), [http://www.thejewishweek.com/news/new\\_york/bloomberg\\_blamed\\_russian\\_ballot\\_failure](http://www.thejewishweek.com/news/new_york/bloomberg_blamed_russian_ballot_failure).

140. Sutherland, *supra* note 73, at 364-79.

section 203 compliance can then be reserved for the largest language group populations.

Cost considerations may limit services to smaller language groups, but even the smallest groups can receive assistance if local jurisdictions provide translated notices that inform voters of their right to use individual assistors pursuant to section 208 of the Act. The financial costs of such basic notices would be minimal if they entail translating a small number of sentences, printing them on election materials designed for the general populace, and distributing additional translated materials that are strategically targeted to appropriate language groups. Oral and video notices could also be distributed via recorded public service announcements, websites, or community organizations that work closely with the relevant populations.

Moreover, state and local government need not bear all of the costs of language assistance. Federal support under the Help America Vote Act (HAVA),<sup>141</sup> which offers a system of grants and government payments for language assistance to be incorporated into state voting systems, provides one basis for expanding state and local programs.<sup>142</sup> The U.S. Election Assistance Commission, which is the primary agency charged with implementing HAVA, has recognized the importance of language assistance and has itself developed voter education and voter registration materials in six languages: Chinese, Japanese, Korean, Spanish, Tagalog, and Vietnamese.<sup>143</sup> The expansion of HAVA grants and materials generated through the Election Assistance Commission could play key roles in the growth of local assistance policies.<sup>144</sup>

Although states and localities have made strides in addressing the needs of limited-English proficient voters, language assistance policies nationwide remain less than ideal. Local policies can be easily revised—or even repealed—and ongoing debates over immigration and immigrants’ rights suggest that local policymaking can quickly shift in directions that disfavor language assistance. The Iowa Secretary of State, for example, provided voter registration forms in Bosnian, Laotian, Spanish, and Vietnamese on its website until 2008, when a state court ruled that Iowa’s English-only law, known as the Iowa English Language Reaffirmation Act,<sup>145</sup> prohibited the distribution of voter materials in

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141. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

142. HAVA contains provisions for payments to the states for “[i]mproving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.” *Id.* § 15301(b)(1)(G).

143. See *Voting Accessibility*, U.S. ELECTION ASSISTANCE COMM’N, [http://www.eac.gov/voter\\_resources/voting\\_accessibility.aspx](http://www.eac.gov/voter_resources/voting_accessibility.aspx) (last visited Oct. 17, 2010).

144. For a discussion of some of the limitations of HAVA, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125 (2009).

145. IOWA CODE § 1.18 (West, Westlaw through 2010 Reg. Sess.). The law requires that “the

languages other than English.<sup>146</sup> And, of course, many localities that have no obligations under the Act have chosen not to provide voluntary language assistance at all. Nonetheless, as I discuss in the next Part, recent developments in state and local election policies may be signaling more lasting trends in anti-discrimination law and in public policies addressing civic participation and the integration of immigrants into local communities.

### III. TRENDS IN VOTING RIGHTS, ELECTION ADMINISTRATION, AND LANGUAGE ASSISTANCE

The expansion of local language assistance policies in recent years reflects an incremental but upward trend towards greater recognition of language differences and language needs in voting rights jurisprudence. Even though the Act is one of the few federal statutes to address language-based discrimination explicitly and has had significant and lasting effects on the participation of minorities in the electoral process, its provisions are largely limited to remedying discrimination against specific language groups. In many ways, the Act lags behind other federal anti-discrimination policies that recognize group differences and establish governmental obligations to address these differences. Many state and local policymakers have been engaged in anti-discrimination projects to fill the gaps that Congress has declined to address through federal legislation.

Local voting policies thus offer important insights into the evolving nature of language rights, anti-discrimination law, and election administration. Most local policies have not been enacted to correct longstanding educational and electoral discrimination in the same way that Congress sought to create structural remedies within the Act. Local policies have instead been designed to address growing community needs and eliminate barriers to political participation facing large numbers of limited-English proficient citizens, especially immigrants and the elderly. In this Part, I discuss language assistance policies as evidence of larger trends in the law to address the subordination of limited-English proficient citizens who cannot exercise a meaningful vote without language assistance and, more broadly, to promote civic engagement and political participation in communities with large populations of immigrants.

#### *A. Language Accommodation and Local Anti-discrimination Law*

Although they are not always framed as formal civil rights laws, local election policies reflect an expansion of anti-discrimination norms to recognize language differences and accommodate those differences through oral and

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English language shall be the language of government in Iowa" and that "[a]ll official documents, regulations, orders, transactions, proceedings, programs, meetings, publications, or actions taken or issued . . . [by the State] . . . shall be in the English language." *Id.* § 1.18(3).

146. King v. Mauro, No. CV6739 (Iowa Dist. Ct., Mar. 31, 2008); see also Michael A. Zuckerman, *Constitutional Clash: When English-Only Meets Voting Rights*, 28 YALE L. & POL'Y REV. 353 (2010).

written assistance.<sup>147</sup> The accommodation of group differences is already an established principle that operates in a number of areas of anti-discrimination law, particularly in federal laws requiring “reasonable accommodations” to address religious discrimination and disability discrimination in the workplace.<sup>148</sup> The voter who is unable to understand an English-only ballot, but who could exercise a meaningful vote if the election materials were available in another language, is not unlike the disabled individual who can perform the essential functions of a job if office practices or equipment are modified, or who can cast a vote if provided access to polling sites and offered appropriate voting technologies to accommodate the disability.<sup>149</sup>

Accommodation laws function as a form of anti-discrimination enforcement distinct from traditional civil rights laws because they embody a “difference” model rather than the more common “sameness” model that prohibits differentiation on the basis of a group characteristic or trait.<sup>150</sup> A difference model “assumes that individuals who possess the quality or trait at issue are different in a relevant respect from individuals who don’t and that ‘treating them similarly can itself become a form of oppression.’”<sup>151</sup> Accommodations are also bounded by cost-benefit considerations affecting both the individual requiring an accommodation and the entity providing the accommodation. Once a group-based difference is recognized, there is a legal duty to provide an appropriate accommodation, but only up to the point that the provider faces no undue hardship.<sup>152</sup>

Standards for language accommodation, although not as thoroughly developed as the reasonable accommodation standards in religion and disability discrimination statutes, do have a basis in federal case law and agency regulations. Interpretations of Title VI of the Civil Rights Act of 1964, along with its implementing regulations and compliance guidelines, recognize that failure to address language barriers among recipients of federal funding can be

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147. I have argued previously that the accommodation of language differences is an ascendant trend in federal voting rights jurisprudence. *See generally* Ancheta, *supra* note 11.

148. *See, e.g.*, 42 U.S.C. § 12111 (2006 & Supp. 2010) (describing standards and forms of disability-based reasonable accommodations within the Americans with Disabilities Act); 29 C.F.R. § 1605.2 (2010) (regulating the reasonable accommodations necessary to prevent religion-based employment discrimination under Title VII of the Civil Rights Act of 1964).

149. *See* Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015 (2007); Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353 (2003).

150. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10 (1996).

151. *Id.*

152. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (holding that religious accommodations need only be made when costs are small and that anything “more than a de minimis cost” would impose an undue hardship).

a form of national origin discrimination requiring action by the recipient.<sup>153</sup> In *Lau v. Nichols*, the U.S. Supreme Court linked language access to national origin discrimination when it concluded that the failure to provide English instruction to non-English-speaking Chinese American students in San Francisco public schools violated Title VI regulations.<sup>154</sup> Guidelines to the regulations stated, in part, that “[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency. . . .”<sup>155</sup> Implicit in the *Lau* Court’s reasoning was the recognition of a significant group-based difference that resulted in a deprivation of rights based on that difference—specifically, the Chinese American students’ inability to understand English led to discrimination resulting from the government’s failure to take adequate steps to instruct the children in English and other basic subjects.<sup>156</sup>

Issued by President Clinton in 2000, Executive Order 13,166 expands on the notion of accommodation within Title VI through compliance standards that require federal agencies and recipients of federal funding to ensure that limited-English proficient individuals receive meaningful access to programs through appropriate forms of assistance.<sup>157</sup> In coordination with Executive Order 13,166, the Department of Justice issued guidelines that do not rely on a fixed trigger like the Act. Instead, they weigh group size and interests against the costs of providing language-appropriate services. Federal agencies and recipients of funding are required under agency regulations to balance multiple factors: (1) the number or proportion of limited-English proficient persons to be served; (2) the frequency with which these individuals come in contact with the program; (3) the nature and importance of the program or service to people’s lives; and (4) the costs and resources available to the recipient.<sup>158</sup>

Employing these guidelines, agencies and recipients of federal funds provide oral interpretation services and written translations when they are justified, but in some instances the balance may tip in favor of providing minimal assistance. This is especially true when the group is small, the interest is less important, and the costs significantly outweigh the benefits. For instance, guidelines for one

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153. 42 U.S.C. §§ 2000d-2000d-4a (2006).

154. 414 U.S. 563, 566-68 (1974).

155. *Id.* at 568 (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970)).

156. The *Lau* decision led to the passage of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1721 (2006), which states in part: “No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” *Id.* § 1703(f).

157. Exec. Order No. 13,166, 3 C.F.R. § 289, 290 (2001).

158. Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123, 50,124-25 (Aug. 16, 2000).

federal agency contemplate a mix of services, including on-site bilingual staff, commercial telephone translation services, use of family members or friends for oral interpretation, and complete, partial, or summary translations in the case of written materials.<sup>159</sup> Unfortunately, Executive Order 13,166 has not been a significant source of voting rights enforcement even though large amounts of federal funding flow to state governments to finance election reforms via laws such as the Help America Vote Act.<sup>160</sup>

Election policies can nonetheless encompass the difference principle inherent in accommodation laws, and they can employ language assistance measures that address barriers to voting while still allocating fair and appropriate costs to the government. Indeed, a weak form of language accommodation already exists in section 208 of the Act, which recognizes the legally significant difference of being an illiterate or limited-English proficient voter and accommodates that difference by guaranteeing the voter's right to have a personal assistor.<sup>161</sup> Although they are not asked to bear the costs of providing assistors, local governments can be held liable for denying assistance to voters who need the help to cast a meaningful vote.<sup>162</sup>

Local language assistance policies reflect even more robust forms of language accommodation. These policies typically recognize the basic difference that attaches to limited-English proficiency by acknowledging that voters who lack the skills necessary to fully comprehend English-only election materials face barriers to participation in the electoral process. Local governments accommodate these differences in a variety of ways through language assistance, including oral interpretation and translations of various written election materials. Election policies also balance the hardships of providing accommodations by limiting both the forms of assistance and the number of language groups receiving assistance. Oral assistance and written translations are

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159. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,315-19 (Aug. 8, 2003) (providing guidelines for U.S. Department of Health and Human Services).

160. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008); 36 U.S.C. §§ 152601-152612. Government enforcement of Title VI against local election officials has largely fallen between the cracks of agency responsibility; the Voting Section of the Department of Justice does not enforce Title VI against state or local governments, and other sections of the federal government that address program access for limited-English proficient individuals do not enforce voting-related claims.

161. 42 U.S.C. § 1973aa-6 (2006). The Act's structural remedies are also manifestations of an accommodation norm, but they are constrained by the requirement of past discrimination against enumerated groups and the triggering mechanisms that limit coverage. The "difference" recognized in sections 4(f)(4) and 203 of the Act is cabined by the definition of language minorities, and measurements of hardships on government are implicitly assessed through statistical triggers that impose full duties on government to provide assistance if they are satisfied, but no duties if the triggers are not met. *Id.* § 1973b.

162. See *supra* note 71 (citing U.S. Department of Justice litigation to enforce § 208).

not necessarily offered to every limited-English proficient voter who needs aid, but there are often gradations in assistance. Section 203, in contrast, requires either full language assistance to a specified language minority group covered by the Act or no assistance at all.

Many local language assistance policies are thus more closely aligned to the meaningful access standards under Executive Order 13,166 than to the structural remedies of the Act, and they offer more flexible forms of language accommodation that reach a wider scope of limited-English proficient voters. The City of Chicago, for example, limits full translations of its written ballots to the two languages required under the Act, offers translated versions of its website in three languages, and provides links to voter information pamphlets in an additional twelve languages.<sup>163</sup> Similarly, Los Angeles County provides full written and oral assistance in Spanish and four Asian languages pursuant to section 203, but the county also distributes a voter information brochure that is translated into three non-required languages. Armenian, Khmer, and Russian.<sup>164</sup>

More than a few language assistance policies have arisen through the actions of state or local election officials, rather than through the creation of legally enforceable civil rights and governmental duties. The enforcement of language accommodations may therefore be problematic in practice. Nevertheless, the simple acknowledgement of language differences and the affirmative steps taken by many state and local election officials reflect an extension of anti-discrimination norms beyond the basic remedial rationales contained in the Act. The growth in state and local laws sends a clear signal to both the federal government and other states and municipalities that language accommodation can and should be expanded, whether through stronger enforcement of federal policies such as Title VI and Executive Order 13,166 or greater voting accommodations by states, counties, and cities.

### *B. Language Assistance and Civic Engagement*

The provision of language assistance to limited-English proficient voters is not merely a matter of anti-discrimination enforcement; it cannot be isolated from a set of larger debates over the role of non-English languages in public life and the responsibilities of government in promoting the civic engagement of immigrants. Disputes over language assistance in elections have been especially contentious because of polar views on the rights and responsibilities of voters who are naturalized citizens, and the various arguments have been covered in great detail in both policy debates and legal and social science literature.<sup>165</sup> Critics argue that English proficiency is a core element of American citizenship

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163. BD. OF ELECTION COMM'RS FOR THE CITY OF CHI., *supra* note 133.

164. See L.A. CNTY. REGISTRAR-RECORDER/CNTY. CLERK, *supra* note 114.

165. See generally SCHMIDT, *supra* note 12; Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006) [hereinafter Rodríguez, *Language and Participation*]; Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001).

and point to the basic requirements for naturalization, which, except for cases involving long-term elderly residents, include English literacy.<sup>166</sup> Critics further suggest that language assistance generally diminishes the role of English as a civic unifier and deters immigrants from learning English in the first place.<sup>167</sup> In contrast, supporters of language rights invoke basic values of democratic participation and contend that public policies should support multiple objectives, such as encouraging transitional language assistance and increasing opportunities for English-language acquisition to incorporate the limited-English proficient into American society.<sup>168</sup> In spite of this debate, an increasing number of state and local governments have opted to provide voluntary language assistance as part of larger agendas to promote civic engagement and immigrants' participation in the political process. Language access policies adopted in cities such as West Hollywood, Minneapolis, and San Francisco provide useful examples.

Approximately one in seven residents in California's City of West Hollywood is Russian American,<sup>169</sup> and the local Russian population plays a significant role in the city's political, social, and cultural life. In order to coordinate key bilingual services to the local population, West Hollywood has employed a full-time bilingual Russian outreach coordinator in its department of public safety and community services since 1995 and has utilized an active Russian advisory board that makes policy recommendations to the city council since 2000.<sup>170</sup> Composed of eleven Russian speakers appointed by the city council, the advisory board provides information on issues relating to the development and coordination of services to the Russian American community and makes recommendations to the city council on programs and policies that could benefit West Hollywood's Russian-speaking residents.<sup>171</sup> Among its primary goals is ensuring that "new immigrants participate actively in the civic life of the City," which West Hollywood has accomplished by providing "translation services, familiarization with the inner workings of local government, assistance in obtaining City and social services, and special cultural events."<sup>172</sup> Voting assistance is just one of several governmental services offered in Russian.<sup>173</sup>

In Minneapolis, where growth of the Hmong, Latino, Somali, and other immigrant communities has created an increasingly diverse population, language assistance in voting is a key element of a centralized plan to provide multilingual assistance in a range of city services. The "Minneapolis in Any Language" plan was developed in 2004 in response to a city council mandate to address language

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166. 8 U.S.C. § 1423(a)(1) (2006).

167. See generally Perea, *supra* note 12; SCHMIDT, *supra* note 12.

168. See Rodríguez, *Language and Participation*, *supra* note 165.

169. See QT-P13 Ancestry: 2000, West Hollywood City, California, *supra* note 128.

170. *Russian Outreach*, *supra* note 132.

171. *Russian Advisory Board*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=731> (last visited Oct. 17, 2010).

172. *Russian Outreach*, *supra* note 132.

173. *Election Results*, *supra* note 131.

needs among the city's multiple immigrant populations.<sup>174</sup> Designed both as a Title VI compliance measure and as a civic engagement tool, the plan contains a clear commitment to the elimination of language barriers, a commitment that "stems from overall city goals of responsive government, community engagement, and customer service."<sup>175</sup> The plan also states that "[a]s residents, workers or visitors who contribute to city life, people with limited English proficiency are entitled to fair and equal access to service," reflecting the plan's parallel anti-discrimination objectives.<sup>176</sup> The plan contains detailed implementation guidelines, including formulas for language coverage, timelines for city departments—including the city clerk's office, which is charged with the administration of local elections—to develop departmental implementation plans, and overall oversight by the city's multicultural services coordinator, housed in the Minneapolis Department of Civil Rights.<sup>177</sup> Services such as language lines and translated websites cut across areas, including voter assistance, to cover Hmong, Somali, and Spanish.<sup>178</sup>

The City and County of San Francisco have a longstanding commitment to recognizing immigrants' civil rights and coordinating multilingual services. Election officials there have employed trilingual ballots in Chinese, English, and Spanish since the 1970s. In addition, the city and county provide translated voter education materials to other immigrant groups. San Francisco's fifteen-member immigrant rights commission was created in 1997 as an advisory body to the mayor and the board of supervisors with a mission to "[i]mprove[,] enhance[], and preserve[] the quality of life and civic participation of all immigrants in the City and County of San Francisco."<sup>179</sup> The commission has oversight over the implementation of San Francisco's language access ordinance, which was originally enacted in 2001 as a broad language rights policy designed to guarantee that municipal services, including services in the department of elections, are accessible to limited-English-speaking residents.<sup>180</sup> The language access ordinance contains coverage formulas paralleling the Act's section 203 provisions, but it makes them applicable to any language group.<sup>181</sup> The ordinance also contains a full set of implementation measures: oral assistance and written translations of city documents; dissemination of multilingual state and federal

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174. MINNEAPOLIS IN ANY LANGUAGE, *supra* note 135, at 10.

175. *Id.* at 4.

176. *Id.*

177. *Id.* at 39-42.

178. *Id.* at 42.

179. CITY & CNTY. OF S.F. IMMIGRANT RIGHTS COMM'N, <http://www.sfgov2.org/index.aspx?page=120> (last visited Oct. 17, 2010).

180. S.F., CAL., ADMIN. CODE §§ 91.1-18 (municode current through March 2010). The law was originally called the Equal Access to Services Ordinance but was renamed in 2009. S.F., CAL. ORDINANCE 202-09 (Aug. 28, 2009).

181. S.F., CAL., ADMIN. CODE § 91.2. Section 91.2(k) defines a "Substantial Number of Limited English Speaking Persons" as "either 10,000 City residents, or 5 percent of those persons who use the Department's services." *Id.*

documents; compliance plans for individual city departments; and enforcement mechanisms and complaint procedures for the public.<sup>182</sup> The San Francisco Office of Civic Engagement and Immigrant Affairs, an administrative arm of local government, serves as a centralized infrastructure for providing technical assistance and coordinating language services across departments.<sup>183</sup>

Not all states and cities that provide language assistance to voters employ immigrant advisory bodies or comprehensive language rights plans, but the growth of immigrant populations has necessitated the coordination of services to local residents, whether they are voters or non-citizens. Voter education and electoral assistance have become two of the many manifestations of language policies and practices that promote the civic engagement of limited-English proficient populations. Immigrant communities will continue to expand throughout the country, but local governments will ultimately face difficult choices in how they incorporate limited-English-speaking immigrants into civic life. Indeed, the future of many cities and suburbs may turn on whether local governments opt to be more inclusive and tolerant of language differences or whether they choose to employ English-only laws and other policies that lead to linguistic exclusion and disenfranchisement.

## CONCLUSION

State and local language assistance policies have proven to be important complements to the structural remedies of the Act, but the needs of many voters requiring oral assistance and translations of election materials may still be unaddressed or underserved. The obligation to meet these needs should be one shared by all levels of government, but whether more jurisdictions ultimately choose to take on these responsibilities remains to be seen. Nevertheless, as immigrant populations continue to grow and more local governments move toward developing election policies that include language assistance for their limited-English proficient citizens, the norms of language accommodation should solidify and extend to more jurisdictions. Congress and the federal government may in time follow the lead of local governments and begin treating language assistance as an essential practice that ensures meaningful access to the vote rather than merely as a remedy for past discrimination. Local voting rights laws will no doubt continue to fuel an agenda that envisions accommodation and civic engagement policies as critical investments in the nation's future.

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182. *Id.* §§ 91.4-11.

183. *Id.* § 91.14.



# REINVENTING VOTING RIGHTS PRECLEARANCE

KAREEM U. CRAYTON\*

“The law was never passed  
But somehow all men feel they’re truly free at last  
Have we really gone this far through space and time,  
Or is this a vision in my mind?”<sup>1</sup>

“[W]e cannot chase our highest ideals unless they are grounded in workable, practical, responsible self-governance.”<sup>2</sup>

## INTRODUCTION

The more things change with Voting Rights Act (VRA) politics, the more they seem stubbornly stuck in place. When President Bush signed into law the Voting Rights Act Reauthorization and Amendments Act of 2006, observers marked the moment as a political triumph.<sup>3</sup> Given the long odds of passing the legislation, there was surely good reason to celebrate. Each of the law’s previous renewals occurred when Democrats controlled at least one chamber of Congress.<sup>4</sup> During the previous renewal in 1982, House Democrats managed to move the bill through a Republican Senate with compromises that ultimately won the President’s support.<sup>5</sup> Few expected that a process dominated by Republicans would produce a civil rights statute that conservatives often assailed for

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1. STEVIE WONDER, *Visions, on INNERVISIONS* (Motown Records 1973).

2. Vice President Albert Gore, Remarks at the International Reinventing Government Conference (Jan. 14, 1999) (transcript available at <http://govinfo.library.unt.edu/npr/newsroom/interego.html>).

3. 42 U.S.C. § 1973c (2006). At the official signing ceremony for the VRA extension, President Bush was joined by a delegation of civil rights leaders, some of whom were present at the initial signing of the legislation by President Johnson in 1965. See LAURIE COLLIER HILLSTROM, DEFINING MOMENTS: THE VOTING RIGHTS ACT OF 1965, at 122-23 (2009); Hamil R. Harris & Michael Abramowitz, *Bush Signs Voting Rights Act Extension; President Vows to Build on ‘Legal Equality’ Won in Civil Rights Era*, WASH. POST, July 28, 2006, at A3; E.W. Kenworthy, *Johnson Signs Voting Rights Bill, Orders Immediate Enforcement; 4 Suits Will Challenge Poll Tax*, N.Y. TIMES, Aug. 7, 1965, at 1, available at <http://partners.nytimes.com/library/national/race/080765race-ra.html>.

4. The most relevant temporary provisions of the Voting Rights Act were extended by Congress in 1970, 1975, and 1982. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179-80 (2007). In some of these instances, Congress did enact important substantive changes, such as extending these protections to new jurisdictions and to protect new groups of citizens. However, the thrust of the debate around these amendments largely followed the template of concerns first raised by opponents in 1965. See *id.*

5. See generally J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135 (Bernard Grofman & Chandler Davidson eds., 1992).

offending principles of color-blindness and federalism.

This latest VRA extension effort was largely characterized by a defensive strategy. Supporters mostly concerned themselves with preserving the rules collectively known as the “preclearance” regime<sup>6</sup>—the administrative oversight system originally crafted to assure that state and local jurisdictions with a history of government-ratified racial discrimination do not violate the Fifteenth Amendment’s racial fairness principle.<sup>7</sup> Most observers agree that during the last forty years of its enforcement, the preclearance regime has promoted improvements in political participation and office-holding for racial minority groups and their preferred candidates.<sup>8</sup> Relying heavily on these and other factual findings, overwhelming bipartisan majorities in both houses of Congress ultimately agreed to reauthorize the oversight system for another twenty-five years.<sup>9</sup>

The architects of the 2006 legislation deserve great credit for passing a bill in a largely unfriendly political context. However, their largely preservative strategy carried with it an important practical substantive cost. By limiting changes to eliminating the most politically offensive judicial interventions of the law, Congress essentially left in place some pathologies that have plagued the system during the last few decades. More importantly, the renewal process again has left crucial questions about the system’s ends and means unanswered. Forty years into the “temporary” era of federal administrative review of state election systems, Congress has avoided the two most vexing questions about the preclearance system: When, if ever, should this oversight structure reach its endpoint? And if there is to be an end, how will we know when we have reached it?

This Article offers a conceptual framework called “reinventing” preclearance

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6. Throughout this Article, I use the terms “preclearance” and “Section 5” to refer to a broad set of provisions in the Voting Rights Act that define a special remedy that protects racial minority against the enactment of new laws and practices that would deny or abridge the right to vote with respect to race. I describe the preclearance remedy at greater length in later sections, but it is helpful to speak with precision at this stage. The term “preclearance” refers to the special remedy that “freezes” existing voting laws in certain designated state and local jurisdictions with a pattern of depressed participation in the electoral arena. *See Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 323 (2000). In order to make changes to existing law, the jurisdiction must receive permission from the Justice Department or the U.S. District Court in Washington D.C. *Id.* In either case, the state must show that its proposed change “does not have the purpose and will not have the effect of denying or diluting the right to vote on account of race or color.” *Id.* at 328 (quoting 42 U.S.C. § 1973c (2006)).

7. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

8. *See generally QUIET REVOLUTION IN THE SOUTH* (Chandler Davidson & Bernard Grofman eds., 1994) (offering an empirical assessment of state level political advancement for minority communities as a result of the VRA’s adoption and enforcement).

9. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, Pub. L. No. 109-246, 120 Stat. 577.

that responds to these pathologies and helps to address these perplexing questions. Taking the reorganization of basic governing structures as a starting point, this Article proposes adjustments to Section 5 that provide a more clear, effective, and lasting means of enforcing voting rights. Distinct from other reform proposals, reinvention identifies and embraces a specific systemic aim—transforming political institutions. The key to this proposal is its practical benefits for both sides in the current preclearance debate. The idea satisfies the conservative goal of reducing federal presence in a traditionally state-run area of policymaking. At the same time, reinventing preclearance also provides some assurances to those who favor more robust tools of voting rights enforcement than those that exist under the current regime.

Part I of this Article reviews some of the major pathologies associated with the current preclearance process. Despite its many benefits and positive results, the review process in Section 5 imposes particular burdens on each of the major stakeholders in covered jurisdictions. Some of these pathologies result from the intentional policy choices by Congress and the courts in framing the VRA, while others are unintentional consequences of the ground-level actors who are involved in the development and management of local elections. Today, very few people are entirely satisfied with how the contemporary system works, even though the recent extension of the VRA was vigorously defended by civil rights advocates.

Part II points out that the result of the most recent legislative amendments left many of these pathologies unaddressed. This Part addresses some of the academic criticism highlighting the most crucial issues that Congress either ignored or sidestepped in 2006. For fear of dismantling an already fragile bipartisan majority favoring renewal, preclearance supporters focused their energy on undoing the most troubling judicial interpretations of the statute. The extension of the statute missed an opportunity to address important long-term questions about the VRA, which the Supreme Court provocatively noted in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*.<sup>10</sup> These developments provide salient reasons for Congress to revisit its fashioning of the preclearance system.

Part III presents the theoretical grounding for an invitation to commence a new approach to preclearance. It lays out the concept of “reinventing” preclearance in greater detail, focusing on its sensitivity to local agency concerns. Drawing partly on the role that the National Partnership for Reinventing Government played in streamlining federal regulation in the 1990s, this part suggests how traditional reinvention has insights relevant to preclearance politics. In contrast to legislative efforts that only tinker with the existing structure of the preclearance system, “reinventing” the preclearance regime requires a deeper, more fundamental examination of the remedy’s purposes and methods. A more ambitious and likely more fruitful approach is to start from the

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10. 129 S. Ct. 2504, 2511-12 (2009) (noting that the VRA data are thirty-five years old and that conditions have significantly improved since the Court upheld provisions of the VRA in the past).

principle that the preclearance mechanism has to focus on the goal of transforming political structures in state and local governments.

Finally, Part IV offers some specific ideas about how a reinvented preclearance system can operate in practice. To demonstrate that this idea is both politically viable and practically effective, I offer examples of flexible provisions that Congress might adopt to achieve the goal of reinventing the preclearance system. While not every state needs to adopt an identical reform, this example of innovative lawmaking at the state level can effect a substantial improvement in the protections for minorities.

## I. THREE PRECLEARANCE PATHOLOGIES

### *A. Preclearance 101: A Primer on the Current System*

The terms “preclearance system” and “Section 5” both refer to a set of administrative processes found in the VRA designed to remedy racial discrimination in the political arena.<sup>11</sup> For designated places, the provision calls for prior review of proposed changes in state and local election law by the federal government.<sup>12</sup> Preclearance is a specific response to years of evasion of federal court orders and executive enforcement actions by Southern jurisdictions.<sup>13</sup> Congress resolved to end this evasive behavior by effectively “freezing” local election laws and placing federal officials in an oversight role.<sup>14</sup> Some courts have characterized the preclearance system as the “shield” of the VRA, which protects voters against future practices and procedures that would enact new forms of discrimination in the election arena.<sup>15</sup>

There are numerous details that would be covered in any comprehensive discussion of the internal workings of this provision, but a basic understanding for present purposes requires attention to its three major components of the provision—its trigger, its scope, and its standard of review.<sup>16</sup> Elsewhere, I have employed these three concepts to expound at greater length on the peculiar ways that the preclearance remedy has evolved over time due to a series of related

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11. *See Bossier II*, 528 U.S. at 323. *See generally* HILLSTROM, *supra* note 3, at 75-123 (outlining the events leading up to the VRA’s passage and its subsequent amendments).

12. *See Bossier II*, 528 U.S. at 323.

13. *See South Carolina v. Katzenbach*, 383 U.S. 301, 336 (1966) (noting that “voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees”).

14. *See generally* QUIET REVOLUTION IN THE SOUTH, *supra* note 8, at 30-32; Kousser, *supra* note 5.

15. *See, e.g., Katzenbach*, 383 U.S. at 318. The Supreme Court noted that “Congress had reason to suppose that” states covered by the VRA might continue resorting to “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. *Id.* at 335.

16. *See* Kareem U. Crayton, *Interactive Pre-Clearance Development*, 27 ST. LOUIS U. PUB. L. REV. 319, 324-40 (2008).

legislative and judicial interventions.<sup>17</sup>

The first element of the remedy is its triggering mechanism. Unlike the civil litigation remedy of the VRA contained in Section 2, the preclearance system identifies parts of the country where Congress originally observed a heightened pattern of evasion.<sup>18</sup> The text of the statute says a great deal about the targeted places where the law applies.<sup>19</sup> Its triggering formula relies upon objective, voting-related factors to specify “covered” jurisdictions. For a state or local entity to fall within the ambit of the system, federal officials must find two things: (1) that a state’s laws contain one of a limited set of voting prerequisites; and (2) that registration and participation rates in certain national elections fall below a threshold percentage of the voting age population.<sup>20</sup> Congress has gradually expanded the reach of the triggering provision since 1965, bringing much of the Southwest (and with it, attention to language discrimination) into the preclearance regime.<sup>21</sup>

If a state or local jurisdiction is deemed subject to the system, the statute imposes a submission requirement.<sup>22</sup> Specifically, the law mandates that all proposed changes in laws related to voting be presented to federal officials for review and approval.<sup>23</sup> For most of the last four decades, the courts have construed the scope of “election-related law” relatively broadly.<sup>24</sup> No such legislation that is adopted in a covered jurisdiction may be enforced without the permission of the federal government.<sup>25</sup> This provision of the VRA shifts the balance of authority between state and federal government, since election management is traditionally an area of control for the states.<sup>26</sup> Even after the normal legislative process has been completed in a covered state, local officials

17. See *id.*

18. See *Holder v. Hall*, 512 U.S. 874, 884 n.2 (1994) (comparing the application of Section 2 to Section 5).

19. See 42 U.S.C. § 1973b(a) (2006 & Supp. 2008).

20. Crayton, *supra* note 16, at 325-26.

21. See SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 470-71 (3d ed. 2007) (noting that many Southwestern states had to provide bilingual election materials in order to comply with Section 5).

22. See Crayton, *supra* note 16, at 329.

23. See *id.*

24. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (“Congress intended to reach any state enactment which altered the election law of a covered [s]tate in even a minor way.”); Crayton, *supra* note 16, at 330.

25. 42 U.S.C. § 1973b (2006 & Supp. 2008).

26. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009) (noting that Section 5 “authorizes federal intrusion into sensitive areas of state and local policymaking [and] imposes substantial ‘federalism costs’ . . . that have caused [m]embers of this Court to express serious misgivings about the constitutionality of § 5”) (internal quotations and citations omitted); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (noting that preclearance is an “uncommon exercise of congressional power”). But see *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491 (1992).

must present their proposal to either the Department of Justice or the U.S. District Court in Washington, D.C. for approval.<sup>27</sup>

The substantive heart of the preclearance process is the standard that federal officers use to examine proposed changes. The Department of Justice (DOJ) has the power to block any proposed change in law that has “the purpose . . . [or] the effect of denying or abridging the right to vote on account of race or color.”<sup>28</sup> The test embodied in this standard calls attention to the jurisdiction’s intent along with the extent to which the plan’s likely results impose negative effects on minority voting power. And importantly, the standard places the burden of proof on the covered jurisdiction.<sup>29</sup> Thus, a proposed change cannot proceed without affirmative evidence that its purpose and effect does not “deny or abridge” the right to vote. This analysis has experienced a different trajectory since the courts have pared back the standard. Over the last thirty years or so, the standard has been that the government may object only to proposed changes that impose a retrogressive effect (i.e., worsening the position of minority political power).<sup>30</sup>

I have argued in previous writing that the development of the preclearance system has followed a somewhat mixed path, largely due to the interaction between the judicial and legislative constructions of the remedy.<sup>31</sup> Through judicial interpretation and legislative amendment, these aspects of the law have developed in some surprising ways over time. While the scope of the preclearance provision has largely expanded over time, the substantive standard to be applied in federal review has almost uniformly narrowed.<sup>32</sup> Even as more jurisdictions and more types of election changes are submitted to the federal government, the level of scrutiny applied in the review process has diminished substantially.

### B. The Players in Preclearance

Before discussing the specific pathologies in the current preclearance system, a brief discussion of the goals of the major actors involved in the process is in order. Generally speaking, there are three primary stakeholders in jurisdictions subject to the preclearance system: (1) the agency officials who administer election rules for the jurisdiction; (2) the racial minority group(s), including (but not limited to) their elected representatives; and (3) the political parties.<sup>33</sup> The

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27. See *Bossier II*, 528 U.S. 320, 323 (2000).

28. *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (citing 42 U.S.C. § 1973c).

29. *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 478 (1997) (noting judicial preclearance); 28 C.F.R. § 51.52(a) (2010) (noting Attorney General preclearance).

30. *Bossier II*, 528 U.S. at 329. It should be noted that the standard for prohibited intent in Section 5, however, has been more varied.

31. See Crayton, *supra* note 16, at 335-41; see also Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481 (2009).

32. Crayton, *supra* note 16, at 325.

33. See, e.g., Luis Fraga & Maria Ocampo, *More Information Requests and the Deterrent Effect of Section 5*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON

preferences and goals of these different groups can sometimes overlap or coincide, but the interplay of their strategies often results in competitive and (at times) obstructive behavior.

The local civil servants who manage the election process in a covered jurisdiction often find themselves in an unenviable and thankless position. If it is true about voting rights politics that “someone always gets screwed,”<sup>34</sup> then those who must execute the policy choices crafted by legislative and executive officials quite consistently rank near the top of the list of candidates. On one hand, they are primarily responsible for preparing and submitting the jurisdiction’s proposed change to the federal government for review. Yet doing their job properly also invites criticism and litigation threats coming from at least one of the other two sets of actors who find themselves aggrieved by the jurisdiction’s policy choices.<sup>35</sup>

While complying with the submission itself is not terribly burdensome, civil servants must develop and produce evidence showing that the proposed election change does not run afoul of the prohibitions in Section 5.<sup>36</sup> Election administrators take their charge seriously, even if the political actors who vote on proposed changes are busy pursuing their own distinct ends. So long as they are not themselves captured by ideological forces, these actors usually maintain a neutral view with respect to adopting a particular election approach. Their foremost desire out of any policy submission is a predictably successful outcome in the federal review process.<sup>37</sup> As some research has shown, covered

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DEMOCRACY, PARTICIPATION, AND POWER OF THE VOTING RIGHTS ACT 47, 51 (Ana Henderson ed., 2007). While Fraga and Ocampo’s framework includes the Department of Justice as a major actor, the framework in this Article focuses on the relationship among the parties within the jurisdiction. The present model addresses the processes leading to a jurisdiction’s submission of a preclearance proposal to the federal government, which is largely dependent upon the relationships among the actors who reside within a given jurisdiction.

34. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998). Karlan states in her description of the redistricting process that “[r]edistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to ‘pull [and] haul’ rather indelicately at the very end. And of course, it often involves somebody getting screwed.” *Id.* (internal citation omitted).

35. See generally Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125 (2009).

36. See *Bossier II*, 528 U.S. 320, 323 (outlining the burdens and requirements necessary to successfully pass preclearance).

37. See, e.g., Raquel A. Rodriguez, *Reflections of Another Bush v. Gore Lawyer*, 64 U. MIAMI L. REV. 631, 636 (2010) (stating that legislators and election officials are faced with challenge of creating policies that “do not create inordinate burdens on the right to vote while enacting laws to ensure that elections are fair, honest, and efficient”); see also HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 16 (2009) (stating that election officials also face the pull of the political parties they are affiliated with because “[t]he problem is that election officials depend on their party for their jobs”); Tokaji, *supra*

jurisdictions tend to withdraw or modify a proposed change even in the face of federal responses like More Information Requests.<sup>38</sup> Even the more subtle suggestion of an explicit rejection deters submissions. Additionally, these actors desire latitude to implement the proposed election changes in order to satisfy the demands of local political authorities and the jurisdiction's governing law.<sup>39</sup>

A second important set of players in the preclearance jurisdiction is the racial minority community, the intended beneficiaries of the preclearance regime. Minority voters desire a relatively robust federal enforcement approach that affords strong protections against discrimination. In practice, this position encourages frequent federal objections to proposed changes whose purpose or effect cause even the most subtle harms to minority political interests. This community often seeks improvements in the levels of representation in elected offices and promotes substantive policies that expand access to voting, especially for members of the minority group.<sup>40</sup> Increasingly, this category of stakeholders includes multiple racial groups whose political interests may not always coincide. The goals of the minority community are often (but not always) conveyed by the political officials who are elected to represent them as well as by private organizations like the Legal Defense Fund, whose members often work to articulate the political interests of minority communities.<sup>41</sup>

Finally, the traditional political parties are an ever-present and significant category of actors in almost every preclearance-covered jurisdiction.<sup>42</sup> Since

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note 35, at 133 (stating that election official have two interests that are often conflicting: (i) their “professional obligation to discharge their duties impartially,” and (ii) their self interest in portraying loyalty to their party in order to ensure their own re-election to a higher office).

38. Fraga & Ocampo, *supra* note 33, at 65-67.

39. *Id.*

40. See, e.g., Brief of the Congressional Black, Hispanic, and Asian Pacific American Caucuses et al. as Amici Curiae Supporting Appellees at 21, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322).

41. Since 1940, the Legal Defense Fund

has been a pioneer in the struggle to secure and protect the voting rights of African-Americans. LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights. LDF’s political participation group uses legal, legislative, public education and advocacy strategies to promote the full, equal and active participation of African-Americans in America’s democracy.

*Political Participation*, LEGAL DEFENSE FUND, <http://naacpldf.org/category/political-participation> (last visited Nov. 14, 2010).

42. See, e.g., Morse v. Republican Party of Va., 517 U.S. 186, 213 n.27 (1996) (noting that political parties played an integral role in continuing discriminatory practices before the VRA); Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act, in THE FUTURE OF THE VOTING RIGHTS ACT* 223, 227-28 (David L. Epstein et al. eds., 2006) (noting that the “politicization of the preclearance process” has resulted in a “great risk that political appointees, of whichever political affiliation, at the DOJ will deny preclearance to changes that might be detrimental to their party, while granting it to laws that might retrogress with respect to minority voters yet benefit their party”).

decisions about the design of electoral structure are inherently political issues, the parties heavily involve themselves in the shaping of the system. This set of actors includes both elected officials responsible for governing the jurisdiction as well as the informal operatives who run the supporting party organizations. As much as with any substantive debate about public policy, one's ideological alignment tends to drive the terms of the debate on a proposed election change that is subject to preclearance. The inherent competition among the parties is perhaps at its zenith in the context of redistricting decisions, where the share of each party's governing power is at stake.<sup>43</sup>

On redistricting and other election-related issues, these ideological groups struggle to maintain or improve the probability that their candidates will control government. Like racial minority groups, partisan agents also fight for election policies that tend to improve their standing among the electorate—especially those voters who consistently support their candidates in elections. This competition can sometimes become complicated when one takes account of the intersecting role that race plays in the pursuit of the party's interest. When a significant portion of the party's membership represents a majority-minority constituency, pursuing the party's overall interests may not entirely coincide with what benefits the racial minority community.<sup>44</sup> However, the simplest means of understanding the interests of the political parties is that each sets out to pursue a greater share of political power by disadvantaging the others.

### C. *Systemic Pathologies*

There are many positive things to say about the benefits associated with preclearance, much of which are contained in the rather voluminous record supporting the most recent renewal of the VRA.<sup>45</sup> Despite its multiple benefits, though, the preclearance system also has encouraged some troubling pathologies in the ways that covered jurisdictions address election policy changes. These local politics are often characterized by strategies that impede the development of new election policies. Over time, this paralysis prevents the jurisdiction from advancing toward a more permanent arrangement that embodies the anti-discrimination norms that the preclearance system commands. Below, I identify three particular problems that contribute to the longstanding stalemate that exists among the actors in preclearance jurisdictions.

The first pathology in preclearance jurisdictions is the lack of serious attention to long-range goals in election policymaking. Decisions about public policy, either in legislatures or in operating agencies, tend to involve both short-

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43. See Persily, *supra* note 42, at 227-28. While it is certainly the case the party involvement is most significant during redistricting, the parties are also concerned with the more common policies like the adoption of new voting equipment or location of polling places that are also subject to preclearance review.

44. *Id.* at 227 (noting that there is a risk that DOJ officials will preclear laws that benefit their own party, regardless of how it impacts racial disparities).

45. See generally Persily, *supra* note 4.

term and long-term considerations.<sup>46</sup> In the election arena, an example of a short-term consideration might involve the possible effects of increasing or decreasing the number of polling places or the percentage of citizens who can cast a ballot in the next election. On the other hand, adopting a new type of polling machinery at every polling place in a jurisdiction may require attention to effects that may only materialize after a series of elections. Preclearance stakeholders rarely reach consensus about the types of policy proposals that require an assessment of long-range factors.<sup>47</sup> Their decisions tend to reflect more limited applications so that they do not entrench a particular election device or procedure for an extended period.<sup>48</sup>

This pattern of decisionmaking is linked to a pair of features inherent to the current preclearance system. One of these features is the indeterminate nature of the preclearance standard in the federal review process. The standard for reviewing changes has shifted substantially due to a lingering dispute between the judicial and legislative branches.<sup>49</sup> As each branch has taken its turn construing the statute, the standard has evolved from a strong emphasis on proportionality to a more limited concern with whether the change diminishes minority political power.<sup>50</sup> Election administrators tend to encourage the adoption of more limited changes as the best way to avoid a preclearance challenge.<sup>51</sup> For their part, minority communities and political parties also tend to rely upon short-term thinking. With unpredictable constructions of the federal test for approving election changes, an actor who is unsatisfied with the existing standard might prefer to hold out for a later, more favorable climate to pursue his or her preferred election policy.

Another reason for the absence of long-range thinking is the absence of a guiding principle for assessing a proposed policy. Policy decisions with longer life spans or broader application can invoke greater scrutiny in the federal review process than more discrete ones.<sup>52</sup> The effects of such discrete changes are often readily apparent, which means that federal review is a more straightforward matter.<sup>53</sup> By contrast, major structural changes to a voting system do not usually have fully discernible effects. The uncertainty in the latter set of changes leaves substantial room for debate. The difficulty in stating long-term effects on

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46. See generally Tokaji, *supra* note 35.

47. See *id.* at 141-42.

48. *Id.* at 145-46.

49. See generally Crayton, *supra* note 16.

50. *Id.* at 321.

51. See Tokaji, *supra* note 35, at 136-37.

52. See Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 43 (2008) (stating that “Section 5 provides for a high level of scrutiny—it requires that the DOJ conduct an advance review of any proposed changes in voting procedures to determine if they would have a discriminatory impact. Section 5 covers jurisdictions through findings of a history of racial discrimination in voting through the use of discriminatory tests or devices”).

53. See *id.*

political power with precision forces federal authorities to project these changes over time, which leaves ample room for uncertainty and dispute. To avoid an uncertain review outcome or a prolonged review process, local authorities running preclearance advocate limited changes.<sup>54</sup> The additional procedural steps could seriously complicate (and most certainly will delay) the jurisdiction's effort to enact change.

A second preclearance pathology is the propensity toward oppositional relationships in the consideration of new policy. Adopting new election law in a covered jurisdiction typically requires an alignment of most (if not all) of the various preclearance stakeholders.<sup>55</sup> However, these interests are not especially inclined toward the norm of cooperation. Aside from the usual partisan competition that shapes all political decisionmaking, preclearance adds an extra constraint because each of the stakeholders holds the ability to either stall or block the adoption of a new policy.<sup>56</sup> The principle of bipartisanship is therefore crucial to avoid floor fights and subsequent litigation over the legitimacy of a new law. Furthermore, the consent of the relevant racial minority group often proves crucial to the success of a policy.<sup>57</sup> This is so because the DOJ regularly consults with leaders within the local minority community when considering the likely effects of the proposed change.<sup>58</sup>

For both the partisan and racial stakeholder groups, the conventional approach for assessing a policy idea is to focus on self-interested and zero-sum concerns. Part of this surely is rooted in a not-so-distant past in which interests were in violent opposition to each other. However, it is also due to the absence of generally accepted ways to measure the benefits and costs associated with the proposed changes. In other words, the terms of the debate themselves are disputed. For any given group, the overall effect of a given proposal depends upon the perceived advantages for that particular group.<sup>59</sup> Further complicating the matter, these debates are often regarded as zero-sum endeavors; one group's potential advantage under a new regime is automatically viewed in terms of another's political detriment. Thus, the result is the politics of trench warfare—where any concessions are tantamount to surrender. Few discussions

54. See Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 Hous. L. Rev. 33, 46-47 (2007) (“Indeed, the Department of Justice has objected more often to changes proposed at the local level than to statewide changes such as congressional redistricting plans.”).

55. See Tokaji, *supra* note 35, at 128.

56. *Id.*

57. See Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. Rev. 827, 845-46 (2006) (stating that the DOJ considered the concerns of minority voters and the impact of electoral structures on communities of color).

58. See *id.* at 853.

59. See Tokaji, *supra* note 35, at 135 (“Where there is ambiguity over which forms of identification should be allowed or how states may go about purging voters from registration lists, for example, it is difficult to imagine Republicans and Democrats reaching agreement.”).

about a specific proposal employ a shared language of assessing the merits for the election system as a whole.<sup>60</sup>

Put another way, the legislative process in a preclearance jurisdiction turns on “veto points” that are available to each of the relevant stakeholders. The negative power to derail any proposed change encourages oppositional behavior from others in discussions about policy.<sup>61</sup> A political party that fervently disagrees with a proposed change will either credibly threaten to defeat the proposal in a vote or to later challenge it in court.<sup>62</sup> For racial minority groups, expressing their displeasure to federal authorities who investigate a jurisdiction’s proposal can potentially draw a request for additional information or a formal preclearance objection.<sup>63</sup> Additionally, their strong opposition could signal a later challenge in federal court under a different provision in the VRA.<sup>64</sup> Real or perceived disadvantages to any preclearance stakeholder are likely to doom any proposed change in the law.

The final pathology in preclearance jurisdictions is the lack of policy innovation. The inclination toward short-term decisionmaking along with the

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60. See Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377, 394 (2006). Ao notes that there were instances of minority group unity during the 1982 and 1992 reauthorization processes after opponents of the VRA attempted “to drive a wedge between Section 203 and Section 5 (preclearance) supporters and thereby [tried] to split the African-American community from the others (despite the fact that other minority groups also benefit from Section 5).” *Id.* However, those minority groups unified once they realized that a strong Section 5 and Section 203 would be beneficial for all. *Id.*

61. See Tokaji, *supra* note 35, at 132.

62. See *id.* For example, Democratic officials will fight for policies that “include as many voters as possible,” while Republican officials will fight against policies that may foster fraudulent voting. *Id.* at 133. As the politics of redistricting in the 1990s demonstrated, states with divided governments often produced stalemates that required judicial interventions to establish district plans.

63. See Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 837 (2006). Tokaji notes that even if there is considerable influence by racial minority groups,

[t]here is also the problem of determining which civil rights groups can best serve as the ‘proxy’ of minority voters in a given community, so as to justify deference to solutions that these groups negotiate with state or local election officials. One can easily imagine dueling groups emerging, each claiming to represent the interests of the minority community, yet taking opposing positions on particular issues.

*Id.*

64. See, e.g., Fuentes-Rohwer & Charles, *supra* note 57, at 853-54. In South Carolina, a delegation of black citizens objecting to proposed changes in election standards influenced the DOJ to move from a provisional objection to part of the proposed election plan to a complete objection to the whole proposed plan. The data show that the DOJ frequently issued objections while citing the influence of communities of color in making those decisions. If this trend continues, then challenges in federal court are a likely progression from current administrative oppositions from minority communities. *Id.*

adversarial nature of the legislative process in preclearance jurisdictions tend to chill any serious effort to pursue innovative election changes. This third pathology is especially lamentable in the wake of several controversial elections at the national and statewide levels.<sup>65</sup> Even with significant federal financial resources available for jurisdictions to experiment with improving the election process, preclearance jurisdictions have tended to shy away from more ambitious proposals. Rather than exploring new ways to prevent the kinds of election day train wrecks that result in extended litigation and political wrangling, preclearance jurisdictions tend to employ a minimalist approach to policymaking. As it is practiced, the current preclearance system favors the maintenance of the status quo, which leaves little room for creativity in the development of election policy.<sup>66</sup>

While the lack of innovation is surely evident with respect to the minority community and political parties, its effects are most troubling for the officials who manage elections in preclearance jurisdictions. These officials often show interest in exploring new methods of balloting and administration;<sup>67</sup> however, the very strict enforcement of the preclearance submission requirement coupled with the inclination of the stakeholders toward adversarial interactions dissuades these actors from proposing or pursuing new approaches.<sup>68</sup> The result is that possible improvements to the election system are rarely raised to avoid conflicts among the stakeholders. These experts are the very persons charged with developing a system that is both reliable and efficient, yet the politics of preclearance can sometimes work against these very norms.

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65. See *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610 (2008). In this case, the Indiana Democratic Party, the League of Women Voters, and other interested voters brought a challenge against an Indiana law that required all voters to show a government-issued photo ID before casting their ballots. *Id.* at 1614. The Supreme Court held that the law was valid because it was not unreasonable to require photo ID to vote and the law was in line with protecting the validity and integrity of the voting process. *Id.* at 1624; see also *Common Cause/Ga. League of Women Voters v. Billups*, 439 F. Supp. 2d 1294, 1305-06, 1360 (N.D. Ga. 2006) (in which a similar voter ID law was upheld in Georgia despite the fact that 300,000 Georgians did not possess a valid government-issued photo ID).

66. See Tokaji, *supra* note 35, at 137 (stating that “[d]espite the significant improvements that have occurred since 2000, then, little has changed in regard to the decentralization and partisanship of American election administration”).

67. See Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 74-77 (2008). Especially since the 2000 presidential election, legislators and officials have attempted to address the complicated task of correcting the many problems that were exposed, such as outdated voting machines, voter purges, and voter discontent. However, despite the passage of the Help America Vote Act (HAVA) to help states eliminate punch-card voting systems, these efforts have been largely ineffective. *Id.*

68. See Tokaji, *supra* note 63, at 836 (indicating that election officials are even faced with the adversarial interests of more than one group within the same minority community who have conflicting interests).

## II. WHY THE AMENDMENTS ENTRENCH THESE PATHOLOGIES

### A. *The Academic Criticism*

Before, during, and after the recent legislative debate on the VRA extension, academic commentators had much to say about what happened—and what should have happened. Much of the writing on the topic registered discontent with the debate in Congress and with the details of the statutory extension itself.<sup>69</sup> Some of this work showed sympathy to the VRA sponsors in recognition of the challenges they faced in achieving a bipartisan compromise while also racing against the clock to pass the bill before an important midterm election.<sup>70</sup> However, far more of the writing concerned the implications of Congress's failure to address unanswered questions and lingering issues.

1. *Clarifying/Redefining Standards.*—Some of the criticism highlighted lingering ambiguities in the operational concepts found in the statute. The most apparent of these is the idea of retrogression, a bedrock test that Congress set out to change in its extension.<sup>71</sup> The sponsors of the extension announced the limited goal of reversing the Supreme Court's interpretation in *Georgia v. Ashcroft*.<sup>72</sup> There, the Court narrowly applied a retrogression analysis to permit the elimination of several majority-black legislative districts if the state compensated by employing a sufficiently large set of "minority influence" districts.<sup>73</sup> Congress very clearly rejected the reasoning advanced in *Ashcroft* and its related decisions, returning the law to the original retrogression standard announced in the *Beer*<sup>74</sup> decision (which would have faulted Georgia's proposed plan due to its reducing the number of minority-majority districts).<sup>75</sup>

Defending the final statute that Congress produced, Nathaniel Persily tries mightily to recast the legislative process to clarify a standard with multiple meanings.<sup>76</sup> He finds that the legislative history from the Senate casts great doubt on how the courts or the DOJ might apply the retrogression standard in practice.<sup>77</sup> Concerned that the Senate's very fractious legislative history revealed severe weaknesses in the new standard, Persily suggests that the Court utilize the

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69. See generally Persily, *supra* note 4; James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

70. Tucker, *supra* note 69, at 206-17 (recounting the difficulty involved in gaining bipartisan support for the reauthorization of the Act).

71. *Id.* at 254. Representative Sensenbrenner, Chairman of the House Judiciary Committee, subsequently engaged in a colloquy with Representative Watt to "confirm that determination of the retrogression standard was to be made 'without consideration of political party control.'" *Id.*

72. 539 U.S. 461 (2003).

73. *Id.* at 490.

74. *Beer v. United States*, 425 U.S. 130 (1976).

75. *Id.* at 141.

76. See generally Persily, *supra* note 4.

77. *Id.* at 183, 226-27.

more cohesive House report as the best evidence of legislative intent.<sup>78</sup> The House report includes a clear, well-reasoned argument in favor of the bill's constitutionality, and it rejects any specific definition of the new retrogression standard.<sup>79</sup>

Nevertheless, due to the constraints inherent in bipartisanship, even the House report contains its share of vagueness. Persily concedes that the report sidesteps tough analytical questions about how to define minority political power.<sup>80</sup> For example, the retrogression inquiry seems focused on minorities' "ability to elect," but it provides no guidance on how the ability-to-elect determination should, as an approximation of political power, be made.<sup>81</sup> Fearing that this broad and vague standard may permit an overly broad application to emphasize those rare elections involving minority candidates with broad cross-racial appeal, Persily suggests additional criteria for the "ability-to-elect" determination.<sup>82</sup> More specifically, he proposes limiting the application of any new standard to a protected group's ability to elect its uniquely preferred candidate of choice.<sup>83</sup> Persily further suggests that the standard only apply where minority voting cohesion is at a level of ninety percent or more for a candidate that minorities prefer but white voters do not.<sup>84</sup>

2. *Loosening Bailout Procedure.*—Aside from the muddled conceptual issues that remain in the renewed VRA, scholars have also criticized how Congress handled problems of quantifiable evidence in the record supporting the Act.<sup>85</sup> On this more than any other single issue in the debate, scholars have registered grave doubts<sup>86</sup> about whether the empirical case could be made for a renewed Section 5 in light of *City of Boerne*.<sup>87</sup> This approach accepted the congressional finding that the best way to mark progress under the Act was to measure political improvements for minority groups.<sup>88</sup>

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78. *Id.* at 189-92. In fact, the cognizant Senate committee quite infamously produced a pair of conflicting reports reading the Act in diametrically opposed ways.

79. *Id.* at 190.

80. *Id.* at 231-32.

81. *Id.* at 240-42.

82. *Id.* at 219-26.

83. *Id.* at 220.

84. *Id.* at 230.

85. See 152 CONG. REC. S8012 (daily ed. July 20, 2006); 152 CONG. REC. H5131, H5207 (daily ed. July 13, 2006).

86. See James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 513 (2008); see also Richard H. Pildes, *Is Voting Rights Law Now at War with Itself?: Safe Election Districts Versus Coalitional Districts in the 2000s*, 89 N.C. L. REV. (forthcoming Dec. 2010), available at <http://ssrn.com/abstract=304587>.

87. *City of Boerne v. Flores*, 521 U.S. 507, 517-19 (1997).

88. See Tucker, *supra* note 86, at 578 (stating that "Section 203 has proven extraordinarily effective in addressing the effects of education discrimination on language minority voters. While a marked difference in participation rates remains between non-Hispanic whites and language

However, the evidence on minority registration and participation rates, office-holding, and (to some degree) racial polarization indicated that significant progress had been made. These trends were especially clear in the jurisdictions where Section 5 had been enforced.<sup>89</sup> In some of these jurisdictions, minority participation rates even exceeded those of white voters.<sup>90</sup> At the same time, the DOJ only rarely objected to proposed election changes, suggesting that states no longer engaged in the kind of wholesale discrimination that was commonplace in the 1960s.<sup>91</sup> How could the continuance of the preclearance system remain justifiable in the face of evidence showing its success? To be sure, some scholars introduced additional evidence that placed these findings in context,<sup>92</sup> but these studies were eclipsed by the alarms about the case for an extension.

Despite problems with the legislative evidence, Rick Hasen cautiously agreed during legislative hearings that an extended version of Section 5 could be a constitutional enactment.<sup>93</sup> He concluded from an analysis of the evidentiary standard applied in post-*Boerne* cases that a reauthorization of Section 5 would likely be valid, but it would need to overcome clear evidence of declining racial discrimination in the political sphere.<sup>94</sup> The most significant piece of evidence in the record was the “Bull Connor Is Dead” problem.<sup>95</sup> Hasen observed that the starkly racist viewpoint is now highly disfavored in Southern political discourse.<sup>96</sup> The “segregation now and forever” regime (of which Connor was a key part) is now largely extinct, powerless, or disfavored due to shifting

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minorities, the gap has narrowed considerably.”).

89. See *Nw. Austin Mun. Util. Dist. One v. Mukasey*, 573 F. Supp. 2d 221, 247-65 (D.D.C. 2008).

90. *Id.* at 247. Rome pointed out that by 1976 black registration rates in four southern states exceeded the national average for blacks and argued that the “emergency with respect to which Congress acted in 1964 ha[d] passed.” *Id.* at 247 (quoting Brief for Appellants at 173, *City of Rome v. United States*, 446 U.S. 156 (1980) (No. 1801840)).

91. Tucker, *supra* note 69, at 210 (stating that many “civil rights groups [perceived] the Bush Administration’s Justice Department [as reluctant] to enforce Section 5” and that “reauthorization would be an uphill battle”).

92. See generally Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51 (2006) (discussing why reauthorization of Section 5 was still necessary).

93. See Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTION LAW BLOG (May 18, 2006, 9:37 AM), <http://electionlawblog.org/archives/005655.html>.

94. See Rick Hasen, *Can “Proactive Bailout” Save VRA Renewal from Constitutional Attack?*, ELECTION LAW BLOG (May 16, 2006, 5:03 PM), <http://electionlawblog.org/archives/005638.html>.

95. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing on S.B. 2703 Before the S. Judiciary Comm.*, 109th Cong. 8-10 (2006) (statement of Richard L. Hasen, Professor of Law, Loyola Law School) [hereinafter *An Introduction to the Expiring Provisions of the Voting Rights Act*].

96. *Id.* at 9.

cultural norms. And the aforementioned evidence reflecting this political shift is a testament to the success of VRA enforcement. Nevertheless, the suggested “proxies” for discrimination are not entirely equal to the task of justifying the Act. Hasen explained that declining DOJ preclearance objections and evidence of private discrimination would either be inadequate or irrelevant in judicial inquiry into ongoing state-sponsored discrimination.<sup>97</sup>

To confront these problems, Hasen later suggested that Congress incorporate new elements into the VRA to demonstrate greater constitutional tailoring in the preclearance remedy.<sup>98</sup> One of his proposed fixes during the legislative hearings was to simplify the bailout process by providing an accessible exit strategy for more covered jurisdictions.<sup>99</sup> Under his formulation, called proactive bailout, DOJ officials would compile a list of jurisdictions that might be eligible for bailout and then notify local officials in those locations about this possibility.<sup>100</sup> Reducing the impact of the federal oversight power would arguably help counteract doubts about the strength of the evidentiary record. While it received the endorsement of some Southern members of Congress, Hasen’s idea was summarily dismissed by advocates as an effort to weaken the provision and as a tool that would introduce too much uncertainty into its application.<sup>101</sup>

3. *Broadening the Concept of Rights.*—A final area of criticism poses perhaps the most provocative claim—that congressional adoption of the VRA ignored the possibility of a more ambitious election reform agenda. This position accepts the earlier points concerning the deficiencies in the record evidence. Demonstrating a sustained need for the preclearance regime may be difficult in light of changing racial norms, but the broader indicators of a systemic meltdown in election management are ever-present. The critique suggests that the challenges relating to racial equality in the political sphere are only symptomatic of a broader set of structural problems in the political system. The obsession with replaying past debates about racial politics has obscured the more fundamental issue of reforming election structures. According to this view, the only way to make real progress in entrenching the right to vote for all citizens is to scrap the VRA discussion altogether.

Going a step beyond Hasen’s recommendations, Richard Pildes has proposed that the entire anti-discrimination framework ought to be replaced with a conversation about systemic reforms.<sup>102</sup> He finds that recent cases involving racial discrimination in the political sphere more often involve partisan politics

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97. *Id.*

98. *Id.* at 10.

99. See Hasen, *supra* note 94.

100. Hasen, *supra* note 93.

101. See, e.g., Bob Bauer, *The Uses of Hearings and the Strength of the “Deal” in the Renewal of the VRA*, MORE SOFT MONEY HARD LAW (May 16, 2006), <http://www.moresoftmoneyhardlaw.com/news.html?AID=712>.

102. See Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 755-62 (2006).

than concerns about the political power of excluded racial groups.<sup>103</sup> The “racial gerrymandering” cases, for example, are often dominated by a discussion of whether a plan has implications for the Democratic or the Republican Party.<sup>104</sup> The same is true for more recent controversies involving voter ID requirements, which are often cast as racial discrimination problems.<sup>105</sup> Because the Court has declined to regulate partisan competition, a coherent model for combating racial discrimination has become illusory; the entire project has been hijacked by political parties.<sup>106</sup> Thus, Section 5 has failed to evolve to address more systemic problems. Because of the politics around its application, Section 5 had very little influence in addressing the vote counting controversies in Ohio and Florida.<sup>107</sup> These problems represent the future of controversies involving the right to vote, yet the major tool of enforcement seems inadequate to accomplish the task.

In this light, the entire effort to show that the VRA remains a viable enforcement remedy misses the point. Pildes suggests that rather than focusing strictly on anti-discrimination, a more comprehensive strategy is to adopt legislation that formally entrenches the right to vote.<sup>108</sup> A positive affirmation of a standard that governs the right to vote would respond more effectively to the racial discrimination problems and would provide broader protections against partisan manipulation in the political system.<sup>109</sup> His proposed structure would permit a much narrower version of Section 5, but that provision would only address a very small number of jurisdictions. The system would adopt a formula with transparent and current information to identify the most recalcitrant jurisdictions.<sup>110</sup> However, its reach would only supplement the more fundamental set of protections that follow from the positive grant of the franchise.

Pildes’s idea acknowledges the political impasse that has defined the nature of debate around the preclearance system. New approaches to improve the protection of the franchise and respond to problems often face great skepticism in this highly divisive environment.<sup>111</sup> Recognizing the practical difficulties in promoting this ambitious idea as an actual policy measure, Pildes suggests that sponsors of Section 5 might leverage his proposed changes in exchange for the establishment of his model provision.<sup>112</sup> As it exists in other constitutional democracies, a uniform national voting-rights protection would effectively respond to both the remaining challenges involving racial exclusion as well as the

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103. *Id.* at 751.

104. *Id.* at 763-64.

105. *Id.* at 751, 758-62.

106. *Id.* at 761-64.

107. *Id.* at 748-49.

108. *Id.* at 756.

109. *Id.* at 761.

110. *Id.* at 761-62.

111. *Id.* at 756 (stating that “the concept of preclearance review . . . [is] fundamentally tied to suspicion of changes to voting practices”).

112. *Id.* at 756-57.

more generalized problems related to systemic failures to regulate the ballot box.

### B. Enter the Roberts Court

With opposition to Section 5 and several critics suggesting what the statute ought to have addressed, few were shocked when a local jurisdiction in Texas filed a lawsuit challenging the application of the preclearance system in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*.<sup>113</sup> While the main alleged legal injury was that this jurisdiction had been denied bailout of the preclearance system in the lower court,<sup>114</sup> most of the briefing in the case by the parties and amici concerned the matter that had been the million dollar question since *Boerne* and a key concern during the legislative reenactments—whether the preclearance provisions after 2006 remained a constitutional exercise of Congress’s enforcement power.<sup>115</sup> The district contended that if bailout was not permissible under the law, then Section 5 as a whole was unconstitutional under the *Boerne* line of cases.<sup>116</sup>

With a thoroughly researched legislative record and a flurry of supporting briefs in the case, one might have expected that a definitive statement from the Court was unavoidable. However, the Court declined to decide the law’s constitutionality in its holding. Instead, the majority (re)interpreted its earlier decision in *City of Rome*, holding that local jurisdictions like NAMUDNO within covered states could independently seek preclearance bailout.<sup>117</sup>

This is not to say that Chief Justice Roberts remained entirely silent about his views of the provision itself. The most charitable way to describe his characterization of the preclearance provision is cautiously ambivalent. His review of the achievements of the VRA resembled many offered by opponents during the reenactment proceedings.<sup>118</sup> Compared to the landscape that existed both times it addressed the constitutionality of Section 5, Chief Justice Roberts claimed, “Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>119</sup> In light of these accomplishments, Chief Justice Roberts registered doubt about the legitimacy of the provision because its “current burdens . . . must be justified by current needs.”<sup>120</sup>

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113. 129 S. Ct. 2504 (2009).

114. *Id.* at 2509-10.

115. See Brief for Appellant at 7, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 2504 (2009) (No. 08-322); see also Brief of Scharf-Norton Center for Constitutional Litigation as Amici Curiae Supporting Appellant at 6, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322).

116. See *NAMUDNO*, 129 S. Ct. at 2510.

117. *Id.* at 2516-17.

118. See *id.*

119. *Id.* at 2511.

120. *Id.* at 2511-12.

The remainder of the opinion's discussion of constitutionality concerns raises questions that should give sponsors of the provision great pause. Notwithstanding its success, Chief Justice Roberts wrote, the provision infringes on "sensitive areas of state and local policymaking [and] imposes substantial 'federalism costs.'"<sup>121</sup> Chief Justice Roberts then recited almost every one of the concerns mentioned by Section 5 opponents in the reenactments, ranging from the statute's potential violation of the equal sovereignty doctrine, to its use of thirty-five-year-old data, to its selective targeting of states for coverage.<sup>122</sup> As to the last matter, Chief Justice Roberts seemed entirely unconvinced of the logic in any law enforcing a standard that would find the same policy illegal in a covered state while permissible in another.<sup>123</sup>

There are, of course, many ways to read the opinion. The most sanguine observers view the language gesturing toward a rather unfavorable constitutional analysis as nothing more than dicta.<sup>124</sup> Some advocates declared that the 8-1 decision effectively endorsed Section 5 since it ultimately sidestepped a serious constitutional challenge.<sup>125</sup> Further, as a practical matter, the decision foreclosed any follow-up claim to the one mooted by this decision.<sup>126</sup> Because smaller jurisdictions like NAMUDNO now may seek bailout, the likelihood of a serious constitutional challenge from a state government is minimal.

Yet one can just as easily read *NAMUDNO* as a how-to manual for a particularly intrepid state government that is willing to pick up where NAMUDNO left off. Indeed, two jurisdictions have recently commenced proceedings to challenge the constitutionality of Section 5 on the merits. Nothing in that passage (dicta or not) indicates that the Court will reject a future invitation to address a direct challenge from an intrepid state government. A constitutional challenge could renew the assertions that the level of progress in the political system is substantial enough to warrant greater scrutiny in the Court's review of the statute. To the extent that the current reenactment of preclearance cannot provide a direct response to the questions that Chief Justice Roberts poses, the future of preclearance remains in some doubt. Accordingly, Congress may have good reason to revisit this issue in the short term.

### III. REINVENTION AS AN ANSWER

As Part II shows, the chances that Congress will need to address the VRA extensions of 2006 are quite considerable. Scholars have pointed out that several issues remain unsettled with the existing statute. At the same time, the Supreme

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121. *Id.* at 2511 (internal citations omitted).

122. *Id.* at 2512.

123. *Id.* at 2515-16.

124. See Rick Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, ELECTION LAW BLOG (June 22, 2009, 8:00 AM), <http://electionlawblog.org/archives/013903.html>.

125. See Erin Miller, *NAMUDNO: Right Question, Wrong Case*, SCOTUSBLOG (Feb. 8, 2010, 10:53 AM), <http://www.scotusblog.com/2010/02/namudno-right-question-wrong-case/>.

126. *Id.*

Court may soon hear one of the many renewed constitutional challenges of Section 5 presently in the lower courts, which may ultimately lead to a decision to strike down the statute. Thus, Congress may well need to reconsider the existing provision to shore up the legislative scheme. This part provides some background on a concept that should prove helpful in this renewed conversation: the reinvention of government.

Reinventing government was a major policy initiative to streamline governmental operations and service delivery during the 1990s. In the face of widespread indicators of public cynicism about the efficacy of government services, President Clinton launched a multi-stage strategy to review and redesign the way that these agencies function.<sup>127</sup> Many policy and administrative scholars credit this reform of government services as among the most successful programs ever launched at the federal level.<sup>128</sup> After reviewing the historical development of this initiative along with its results, this Part identifies the most significant factors that accounted for its effectiveness. The process of reinventing government provides an especially helpful model for adopting a new framework for the preclearance process in the VRA.

#### *A. The Foundations of Reinvention*

The origin of “reinvention” as a concept is traceable to three related sources. The most dominant accounts find that the idea emerged in the private sector, where large corporations saw the potential for changing internal workplace culture to resolve systemic problems in their traditional hierarchical governance structures.<sup>129</sup> Borrowing heavily from academic studies in organizational behavior, proponents of reinvention in these companies presented their ideas as a route to enhance output efficiency and improve workplace morale.<sup>130</sup> In management settings, reinvention principles included specific reforms such as decentralizing authority, flattening governing structures, and increasing employee control over the workplace decisionmaking.<sup>131</sup> All of these changes were accomplished with the goal of increasing consumer satisfaction with a company’s

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127. See John Kamensky, *A Brief History of Vice President Al Gore’s National Partnership for Reinventing Government During the Administration of President Bill Clinton 1993-2001*, NAT’L P’SHIP FOR REINVENTING GOV’T (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whoweare/historyofnpr.html>.

128. These scholars include Ted Gaebler, David Osborne, Jonathan D. Breul, and John M. Kamensky.

129. John M. Kamensky, *Role of the “Reinventing Government” Movement in Federal Management Reform*, 56 PUB. ADMIN. REV. 247, 248-49 (1996).

130. See generally DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1993). This book sparked the movement and coined the phrase “reinventing government” that would later become the basis for the National Partnership for Reinventing Government.

131. See *id.* at 20-24.

products and services.<sup>132</sup>

The fundamental ideas giving rise to reinvention also can be found in the traditional work in public choice theory. Writers such as Mancur Olson,<sup>133</sup> Gordon Tullock,<sup>134</sup> and William Niskanen<sup>135</sup> developed models of governance that emphasized the role of local government officials in maintaining a democratic society.<sup>136</sup> Aside from the functions of more formal institutions such as legislatures and courts, a bureaucracy's relationship with private citizens affects the level of public acceptance of and adherence to governmental authority.<sup>137</sup> A record of bureaucratic competence and effectiveness creates confidence in the state's ability to address collective problems; it also enhances the credibility of the state's commitments and threats. Without reliable performance and responsiveness from administrative agencies, the individual citizen has little reason to comply with the demands of the state.<sup>138</sup> Accordingly, this literature teaches that the proper functioning of bureaucracies can contribute to the longevity of any political regime.

The roots of reinvention also have a home in public administration literature, which commonly takes a cause-and-effect approach to examine efforts to reshape government structures. Much work in this area is concerned with more measurable outcomes such as public welfare and distributional equality, as opposed to more abstract concepts relevant to political theories of governance.<sup>139</sup> Unlike public choice models for bureaucratic service, public administration scholars commonly trace the historical development of the state's bureaucratic structure.<sup>140</sup> They often examine the results of reorganization strategies to determine how effectively a given approach succeeds in aligning the various political interests necessary to achieve a structural change.<sup>141</sup> A common focus

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132. See *id.* at 16-20.

133. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

134. See JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

135. See WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

136. *Id.*

137. See generally Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 FED. COMM. L.J. 483 (2009).

138. See *id.* at 496-504.

139. See Margo L. Bailey, *Cultural Competence and the Practice of Public Administration*, in DIVERSITY AND PUBLIC ADMINISTRATION: THEORY, ISSUES, AND PERSPECTIVES 177, 180-85 (Mitchell F. Rice ed., 2005); see also Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060-62 (1956).

140. See, e.g., DAVID G. FREDERICKSON & H. GEORGE FREDERICKSON, MEASURING THE PERFORMANCE OF THE HOLLOW STATE 1 (2006) (noting that "in the classic public administration ethos, well-managed governments will perform well").

141. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1759 (2008) ("For public administration, the tool of choice to

of study is how the U.S. President and his cabinet can enact organizational changes in the executive branch that can further his policy goals. Significant changes are rarely possible through executive orders alone because of the multiple centers of power in agencies; persuasion and consensus are essential to developing a new governing structure.<sup>142</sup> This work is often quite dependent upon context, although many writers attempt to draw parallels across historical periods and government agencies.

### *B. The Reinventing Government Experience*

In the 1990s, the National Performance Review (NPR) was the Clinton administration's comprehensive effort to improve the function of government agencies.<sup>143</sup> Reacting to the historical association of Democrats with the runaway growth of an ineffective bureaucratic state, President Clinton campaigned on a commitment to "mov[e] from red tape to results to create a government that works better and costs less."<sup>144</sup> This approach, adapted from a scholarly study of agency development called *Reinventing Government*, was a prominent theme in Clinton's blueprint for a domestic program. Government reform was an influential element in substantive policies that formed the "New Democrat" agenda.<sup>145</sup> Citing the lack of public confidence in government efficacy, the administration called for "a new customer service contract"<sup>146</sup> in citizen-government relations, and it sought "to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."<sup>147</sup>

Earlier presidential efforts at reforming administrative agencies typically relied upon external commissions to conduct reviews and provide recommendations. The problem with the so-called "blue ribbon panel" strategies, though, was that partisan wrangling over panel appointments sometimes consumed large quantities of time and resources; in some cases, naming a panel blunted momentum for reform. Additionally, the selected members tended to avoid more critical examinations for fear of potentially

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promote good management is rigorous measurement of agency and program performance.").

142. See Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 477 (2010) ("By increasing the numbers of political appointees in the executive branch, Presidents have also increased their own managerial responsibilities as they try to implement coherent policies.").

143. See AL GORE, *COMMON SENSE GOVERNMENT: WORKS BETTER & COSTS LESS* 1 (1995).

144. AL GORE, *FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS*, at i (1993).

145. OSBORNE & GAEBLER, *supra* note 130; see generally KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON* (2010).

146. GORE, *supra* note 144, at i.

147. President Bill Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993), available at <http://govinfo.library.unt.edu/npr/library/speeches/030393.html>.

divisive and volatile choices about downsizing or eliminating an agency.<sup>148</sup> Accordingly, the final reports from these panels rarely offered any serious plan of action for restructuring government; once announced, these commission recommendations often sat untouched. In fact, the review panel authorized by Congress in 1992 (months before Clinton was elected) never was staffed by his predecessor due to internal bickering about basic staffing decisions.

The Clinton approach was decidedly different. Shortly after entering office, Clinton tasked Vice President Gore to lead a six-month review of government administration, which culminated in a report that included specific policy recommendations.<sup>149</sup> Gore amassed an NPR team of 250 civil servants representing multiple sectors within the government workforce to gather information from various government agencies.<sup>150</sup> This review team consisted of top officials in Washington, D.C., local bureaucratic employees, and state officials who had run similar reinvention efforts for their own civil service systems.<sup>151</sup> Importantly, the group's review strategy utilized its diversity to obtain several perspectives on governmental performance. The NPR spoke directly and extensively with federal employees and gathered input from over 30,000 citizens about their experiences with government administration.<sup>152</sup>

The NPR recommended that agencies form separate "reinvention teams" to direct the implementation of the new agency policies developed in the system-wide review stage.<sup>153</sup> Additionally, the NPR encouraged the creation of "reinvention laboratories" within agencies—more informal groups that could think creatively and pioneer innovative solutions to administrative problems—and researched successful pilot programs already underway.<sup>154</sup> Vice President Gore personally conducted a series of town hall meetings, and a public summit took place to engage business, government, and academic elites in the discussion on reform.<sup>155</sup>

While the NPR was in the midst of compiling its report in 1993, Congress passed the Government Performance and Results Act, which was intended to facilitate a results-oriented approach to the administration of government.<sup>156</sup> Permitting "flexibility in return for accountability," the Act allowed agencies to request waivers of compliance with certain regulatory requirements if they met

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148. See, e.g., William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 517-20 (2006).

149. Jonathan D. Breul & John M. Kamensky, *Federal Government Reform: Lessons from Clinton's "Reinventing Government" and Bush's "Management Agenda" Initiatives*, 68 PUB. ADMIN. REV. 1009, 1011 (2008).

150. *Id.*

151. *Id.*

152. See GORE, *supra* note 144, at 14-15.

153. JOHN KAMENSKY, NAT'L P'SHIP FOR REINVENTING GOV'T, WHO WE ARE, A BRIEF HISTORY (Jan. 1999), available at <http://govinfo.library.unt.edu/npr/whowear/history2.html>.

154. *Id.*

155. *Id.*

156. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

certain other requirements.<sup>157</sup> The 103rd Congress passed thirty bills implementing NPR recommendations.<sup>158</sup>

In 1994, the NPR assisted numerous federal agencies in creating standards for customer service;<sup>159</sup> hundreds of obsolete programs were eliminated;<sup>160</sup> Congress successfully passed legislation reforming the procurement system;<sup>161</sup> and the NPR alleged that levels of satisfaction among citizens and federal employees had doubled.<sup>162</sup> By 1995, over 100,000 employees had been removed from the federal workforce<sup>163</sup> (that number was predicted to exceed 200,000 by 1996, leading to the smallest federal workforce in 40 years<sup>164</sup>). The NPR also claimed billions of dollars of reduction in debt,<sup>165</sup> although the U.S. Government Accountability Office disputed a direct correlation with adopted NPR recommendations.<sup>166</sup>

In September 1995, the NPR generated a second major report, *Common Sense Government*, with a new list of 250 recommendations.<sup>167</sup> And at the beginning of President Clinton's second term, the NPR effort underwent a change in focus.<sup>168</sup> The effort was renamed the "National Partnership for

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157. GORE, *supra* note 144, at 34.

158. 141 CONG. REC. H1960 (daily ed. Feb. 21, 1995) (statement of Rep. Thurman).

159. See KAMENSKY, *supra* note 153.

160. 141 CONG. REC. H1959 (daily ed. Feb. 21, 1995) (statement of Rep. DeLauro); Breul & Kamensky, *supra* note 149, at 1014.

161. 141 CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney).

162. Breul & Kamensky, *supra* note 149, at 1014.

163. CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney). Most of the phasing out occurred through a legislated buyout plan (the Federal Workforce Restructuring Act of 1994). See Statement on the National Performance Review, 140 CONG. REC. S12937 (daily ed. Sept. 14, 1994) (statement of Sen. Glenn, Chairman of the Sen. Gov't Affairs Comm.) (referring to the federal employee buyout bill); GORE, *supra* note 144, at 14 (expressing the intention to implement the downsize of the workforce through a buyout). Indeed, the issue of eliminating federal jobs had raised some attention in the media. See, e.g., Gwen Ifill, *Plan to Tighten Government Could Affect 100,000 Jobs*, N.Y. TIMES, Sept. 1, 1993, at A16; Gwen Ifill, *Washington Memo; In Trying to Streamline Government, Gore Fights a Battle Many Have Lost*, N.Y. TIMES, Sept. 5, 1993, at 38 (noting that proponents of the downsize avoided using the word "layoff").

164. 141 CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney); id. at H1959 (statement of Rep. DeLauro); George Nesterczuk, *Reviewing the National Performance Review*, 1996 REGULATION 31, 35-36 (1996).

165. 141 CONG. REC. H1958 (daily ed. Feb. 21, 1995) (statement of Rep. DeLauro); Breul & Kamensky, *supra* note 149, at 1014.

166. U.S. ACCOUNTABILITY OFFICE, GAO/BGO-99-120, NPR'S SAVINGS: CLAIMED AGENCY SAVINGS CANNOT ALL BE ATTRIBUTED TO NPR (1999), available at <http://www.gao.gov/archives/1999/gg/99120.pdf>; Breul & Kamensky, *supra* note 149, at 1014; Nesterczuk, *supra* note 164, at 35.

167. See GORE, *supra* note 143.

168. Following a difficult period in 1995 when the government was trying to balance the budget, some said that the NPR movement had ebbed slightly. See, e.g., Stephen Barr, *Gore's*

Reinventing Government," and proponents began targeting thirty-two "high impact" agencies, chosen because of their level of interaction with the public.<sup>169</sup> The NPR focused on assisting in the complete "culture change" at those entities by allowing reinvention policy to permeate every aspect of their day-to-day administration.<sup>170</sup> The NPR compiled practical "reinvention rules" in the *Blair House Papers* and pursued initiatives such as "Access America," a project designed to facilitate electronic government.<sup>171</sup>

The NPR also facilitated communities of practice, working with state and local governments to address different but related policy issues in logical, effective combination. In this way, the NPR "became a convening authority and a neutral meeting place of cross-agency efforts"<sup>172</sup> and "piloted the development of performance-based organizations"<sup>173</sup> (PBOs). The innovation successfully transformed three of the substantive policy areas at the core of the President's agenda: "child health insurance, safe cities, and the twenty-first century workforce."<sup>174</sup>

### C. Key Elements of Reinvention

While scholars have discussed a variety of reasons for the overall success of the Clinton-Gore reinventing government strategy, the point of the present examination is to identify aspects of the reinvention program that can be applied to the voting rights preclearance system. In this connection, three specific elements of the reinventing government initiative are worthy of consideration: setting goals, enhancing efficiencies, and encouraging innovation.

1. *Clarifying Goals.*—One of the core governing principles expressed by the NPR was "back to basics," a concept that meant returning to the core goals of each agency's work. A common complaint during the NPR's systemic review was that agency officials showed little interest in pursuing any goals associated with their perceived functions.<sup>175</sup> Instead of providing quality service to a

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*Team Turns to Making Reinvention Deliver; At 5-Year Point, 32 Agencies' Goals Are Readjusted*, WASH. POST, Mar. 3, 1998, at A15 (noting that commentators said the effort had "defused," lost momentum, and was on "automatic pilot").

169. Breul & Kamensky, *supra* note 149, at 1013-14; KAMENSKY, *supra* note 153.

170. See JOHN M. KAMENSKY, NAT'L P'SHIP FOR REINVENTING GOV'T, REINVENTION IN THE SECOND CLINTON-GORE ADMINISTRATION: CHANGING THE CULTURE OF GOVERNMENT AGENCIES—1997-2001 (last visited Nov. 14, 2010), available at <http://govinfo.library.unt.edu/npr/whowere/historypart4.html>.

171. See generally BILL CLINTON & AL GORE, NAT'L PERFORMANCE REV., BLAIR HOUSE PAPERS (1997), available at [govinfo.library.unt.edu/npr/library/papers/bkgrd/blair.html](http://govinfo.library.unt.edu/npr/library/papers/bkgrd/blair.html) (Jan. 1997); see also ACCESS AMERICA, <http://govinfo.library.unt.edu/accessamerica/> (last visited Nov. 14, 2010).

172. Breul & Kamensky, *supra* note 149, at 1014.

173. *Id.*

174. *Id.*; see also KAMENSKY, *supra* note 153.

175. See Breul & Kamensky, *supra* note 149, at 1013-14.

constituency or enhancing some substantive goal identified in legislation, the public reported that agency officials neglected or ignored the needs of constituents.<sup>176</sup> Their attention seemed less directed to responding to requests for assistance than to extending the life of the agency. In other cases, agencies had failed to fulfill any mandate due to an absence of clear goals; others failed because different levels in the agency pursued multiple or even conflicting policy goals.<sup>177</sup>

In response to this combination of bureaucratic lethargy and confusion, the reinvention program mandated that all agencies identify clear, attainable objectives to guide their operation.<sup>178</sup> Unlike a typical command-and-control directive, however, the NPR established working groups that included agency employees, federal managers, and consumers to articulate these operational goals. These working groups gathered information from a variety of sources, including public surveys, agency manager interviews, and records from the relevant congressional oversight committee.<sup>179</sup>

Furthermore, these initial working groups were tasked to identify objective goals within each agency that could be assessed by the public. The goals were tailored to the particular needs and capacity of a given agency because the groups were differentiated by substantive area.<sup>180</sup> Additionally, the goals reflected a common understanding because each group also reflected a variety of major interests that were relevant to the agency's work. With these articulated objectives in place, NPR officials predicted that reinvented agencies could employ internal reforms organized around a uniform purpose.<sup>181</sup>

2. *Assessing & Enhancing Efficiencies.*—A core feature of the NPR reinvention campaign was “cutting red tape” inside the various federal agencies.<sup>182</sup> With a guiding purpose for its work clearly established, an agency could then begin a close review of its internal operations to assess how well employees accomplished its aims. Reinvention teams recognized that this effort required reducing or eliminating regulations that interfered with agency performance. The NPR team also pursued financial savings by removing redundant or inefficient sectors of the federal workforce.

Both of these tactical steps were politically important. Each helped to dismantle the very stark image of bloated, inefficient agencies, a powerful symbol that fed into the public’s strongly negative perceptions of government performance and responsiveness. A common frustration reported in the NPR’s early public satisfaction surveys was that internal rules were so indecipherable

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176. *Id.*

177. *Id.*

178. *Id.* at 1017 (“Agencies were expected to develop plans, identify the responsible officials, and apply resources to achieve these improvement goals within their own organization.”).

179. *Id.* at 1011.

180. *See id.*

181. *See id.*

182. *Id.* at 1013; *see also* GORE, *supra* note 144, at 2-3.

that they deterred citizens from seeking services.<sup>183</sup> Simplifying the maze of forms, procedures, and requirements improved accessibility for citizens—particularly persons with limited education and financial means who depended on the reliable and efficient delivery of agency service.

How was this part of the reinvention regime implemented? The NPR summarized its practical aims as challenging agencies so that they worked better and cost less.<sup>184</sup> By focusing on aspects that would accomplish their agreed-upon ends more efficiently, the agencies would become more results-oriented under this approach. Removing procedural barriers started with identifying essential components of each agency's operation.<sup>185</sup> These assessments involved interests at every stage of policymaking from formation to delivery at the point-of-contact with consumers. This effort made it possible to eliminate unnecessary or unhelpful steps while promoting those functions that promoted the agency's effectiveness.

For the thirty federal agencies and bureaus whose functions directly engaged segments of the public, including the National Park Service and the Internal Revenue Service, the program prompted the implementation of discrete but visible policy changes that helped improve public accessibility. In the IRS, for instance, this meant expanding telephone service so that customers could contact officials twenty-four/seven during tax season.<sup>186</sup> Similarly, the National Park Service directed employee guides to include explanations in their formal tours showing why a particular location merited funding from the taxpayer.<sup>187</sup> Each of these changes provided a strong signal to the user that agencies were adopting a more open and responsive culture.

Aside from promoting these policies, the NPR established agreed-upon metrics for tracking improvements in agency functions. Using the findings from the multi-level working groups, the NPR operationalized the concept of “work[ing] better” by identifying objective markers of efficiency that were specific to each agency’s function.<sup>188</sup> Accounting for these measurements in the reinvention program provided agency operatives with an incentive to succeed in promoting the goals of the agency. Further, the agency’s managers could easily mark the progress of its units and test various programmatic ideas. Perhaps most importantly, these measures were transparent. Accordingly, they recruited public involvement in maintaining the quality of agencies. A typical metric of success

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183. See Breul & Kamensky, *supra* note 149, at 1014.

184. See *id.*

185. *Id.* NPR’s efforts to reduce costs “led to a reduction in the size of the federal workforce of 426,200, the passage of 90 pieces of legislation, the elimination of 250 obsolete programs, the reduction of 640,000 pages of unnecessary internal regulations, and the elimination of another 16,000 pages of regulations affecting the public and businesses.” *Id.*

186. See *id.*

187. See *id.*

188. *Id.* (using objective markers such as customer and employee surveys to gauge the perceived success of the NPR’s efforts).

was public satisfaction with the delivery of services.<sup>189</sup> While it was not the only basis for assessment, noting public sentiment helped assure that bureaucracy remained alert to address the needs and concerns of the end-users of public services.

3. *Encouraging Innovation.*—The third notable aspect of reinvention was encouraging innovation at the agency level. If identifying efficiency was the core of reinvention, innovation was the most enduring way of entrenching the effects of a reform strategy. Reinvention’s departure from more traditional reorganization efforts was declining the formal announcement of major policy changes from the cabinet secretary’s office in Washington, D.C. Instead, the NPR redefined the agency’s internal culture starting with the day-to-day functionaries within the agencies.<sup>190</sup> The theory behind this approach was that changes in culture depended upon mid- to low-level civil servants embracing different norms. Only with their willingness to pursue innovation could the agency avoid the low ratings in public surveys that gauged their flexibility in responding to new types of problems.

In at least two specific ways, the bottom-up approach to reinvention improved the agency’s ability to innovate. First, the internal innovation laboratories established a greater sense of ownership and control at the point-of-contact with the public because these entities involved employees at every agency level. Under the traditional system, local agency officials had little opportunity to contribute to the framing of important management policies.<sup>191</sup> Frontline workers stationed outside of Washington, D.C. were generally the objects rather than subjects of significant reform efforts. With a clear stake in the success of the new management strategy, civil servants had greater incentive to exercise their discretionary authority to address unanticipated problems of those seeking assistance.<sup>192</sup> The reoriented approach engendered a greater sense of ownership and regard for the new culture.

Additionally, the reinvention program was also mindful to permit the agency to evolve over time. Long after the initial reinvention campaign had run its course, the NPR members desired to leave a structure that could continue to foster new management ideas.<sup>193</sup> This formula for ongoing innovation relied on maintaining channels of communication to all parts of the agency. It also required the ability of local agency officials to experiment with policy ideas that

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189. *Id.*

190. *Id.* at 1011 (noting that breaking from tradition included recruiting career government employees and forming a team of 250 staff “with each major agency creating its own internal teams”).

191. *See id.* at 1013.

192. *Id.* (“The NPR launched a broad effort to encourage frontline staff to incorporate the principles of reinvention into their day-to-day work: putting customers first, cutting red tape, empowering employees, and cutting back to basics. This became a broader movement in the federal workforce to reshape the governmental bureaucratic culture to be more entrepreneurial and less rule driven.”).

193. *See id.*

were tailored to their specific experiences. Not only did these laboratories create an incentive to accept the standards-based culture in governmental agencies; the people most likely to interact with the public possessed authority to find new ways to be responsive. In other words, local officials were empowered to seek innovative solutions (within limits) in their agencies and then pass along their experiences to agency leaders in Washington, D.C.

The reinvention campaign included other incentives for agency employees to participate in the innovation agenda. The most publicized of them was the Hammer Award, a prize given to federal employees throughout the government who had succeeded in introducing new, effective ways of controlling costs and improving the quality of agency service.<sup>194</sup> By making these awards available, the framers established a multi-agency network for passing along ideas to advance agency management. The reinvention movement allowed even lower-level employees to transplant their ideas across substantive areas. These efforts were not always popular among senior management in the executive branch,<sup>195</sup> but they established a norm of continually improving public works in response to new conditions.

#### IV. APPLYING REINVENTION TO THE PRECLEARANCE SYSTEM

This final Part applies the concept of reinvention to the VRA's preclearance system. Building on observations from Part III, I discuss the preconditions necessary for reinvention of the preclearance system to work in practice. As noted earlier, the present submission and review process suffers from three specific pathologies: (1) a lack of clear goals; (2) indeterminate metrics for charting the jurisdiction's progress; and (3) a stalemate on innovative changes in electoral structures. The politics at play in each of the legislative reenactments of the statute contributed to this outcome. The discussion in Congress avoided any resolution of these difficult issues in order to avoid a political impasse.<sup>196</sup>

I submit that a different approach—reinvention—would respond to these systemic problems. Also included in this section are some concrete ideas about what state and local governments might do to in furtherance of reinvention. This new framework provides clear goals for covered jurisdictions to accomplish, identifies ways to track and enhance efficiencies in the process, and creates opportunities for the stakeholders in covered jurisdictions to develop innovative methods of achieving their goals.

##### *A. The Goal of Reinvented Preclearance System*

The most controversial task for a reinvention effort in this context is establishing a clear purpose for the preclearance system. What exactly is to be

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194. *Id.* at 1021.

195. See *id.* at 1020. NPR efforts were met with skepticism from the Executive Branch, who doubted the NPR's ability to follow through with its initiatives. *Id.*

196. See, e.g., 152 CONG. REC. S8024 (daily ed. July 20, 2006); 152 CONG. REC. H5131-207 (daily ed. July 13, 2006).

accomplished with an additional twenty-five years of preclearance oversight? The text of Section 5 indicates that its function is to deny practices with a purpose or effect of denying or abridging the effective exercise of the franchise.<sup>197</sup> But this tells us very little about the strategic goal for the provision in the places where it applies. The question about purpose is a deceptively simple one, especially since the original framers of the original provision were vague about any goal. Further, each reenactment reveals a lack of consensus about how to resolve this issue.

The absence of a shared understanding is evident from the competing characterizations of Section 5's purpose. For its part, the U.S. Supreme Court has shifted its view of what the provision is designed to do. Shortly after 1965, the Court had endorsed a very robust application of the provision in *Allen v. State Board of Elections*.<sup>198</sup> Since then, the Court has supplanted that view with a more limited understanding—that Section 5 simply serves as a deterrent for “backsliding” by covered jurisdictions.<sup>199</sup> This “retrogression only” view of the provision would address only a small share of discriminatory practices, leaving the bulk of enforcement tasks to other parts of the statute.<sup>200</sup> The Justices have consistently rejected interpretations that preclearance should provide significant, independent protections beyond the remedies found in Section 2 of the statute.<sup>201</sup> This approach suggests a very modest end for Section 5, since only the most overt state conduct would be considered retrogressive.

But the Court is not alone in its confusion about the goal of the preclearance remedy. The reenactment debates in Congress included several asserted purposes of Section 5.<sup>202</sup> Those who opposed legislative extension of Section 5 viewed this provision as a temporary means of blocking the specific types of racial exclusion from the political system.<sup>203</sup> By eliminating the most significant

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197. 42 U.S.C. § 1973 (2006).

198. 393 U.S. 544, 565-66 (1969). In rejecting a narrow conception of the provision, the Court stated:

The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.

Moreover . . . the Act gives a broad interpretation to the right to vote, recognizing that voting includes “all action necessary to make a vote effective.”

*Id.* (internal citations omitted).

199. H.R. REP. NO. 94-196, at 57-58 (1975) (“Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.”).

200. See *Bossier II*, 528 U.S. 320, 329 (2000) (finding the concept of retrogression to apply to both the “purpose” and “effects” prongs of the prohibitions found in Section 5); *Beer v. United States*, 425 U.S. 130, 141 (1976).

201. See generally Crayton, *supra* note 16.

202. See generally Luis E. Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 130 (2007).

203. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 95, at 8-10 (statement of Richard L. Hasen, Professor of Law, Loyola School of Law); *id.* at 13-14

barriers to minority political participation, these members expected that the provision would be in place only for a very limited time. Accordingly, this group grew far less comfortable with the repeated extension of these tools to address new political problems, especially where its application was arguably uneven or inequitable.

Contrasting with this view is the claim by Section 5 advocates. Their understanding was that Section 5 was directed toward achieving more substantive changes than either of the aforementioned approaches would allow.<sup>204</sup> Applying the statute as they imagined would address multiple types of voting problems. And the process would remain in place until the vestiges of racial discrimination entirely disappeared. This conception of the remedy reflects the aim found in the story of Sisyphus.<sup>205</sup> While that character's reasons for moving the stone up the hill were never quite clear, he remained committed to the seemingly endless task.

In contrast to both of these contrasting approaches, I propose a distinct way of defining the aims of the preclearance system. Breaking the impasse from these reenactments requires a new understanding that embodies elements of what each side desires in a refined preclearance provision. Rather than adopting an indefinite procedural goal (as the current defenders of Section 5 want) or one that is too limited to be effective (which reflects the Court's thinking and perhaps that of some opponents to the current law), the framers of a reinvented system should specifically announce that *jurisdictional transformation* is the goal of the provision.

By transformation, I refer to a deep and durable change in the electoral structures and processes within a jurisdiction so that their inputs include the opinions of minority communities and their outcomes reliably reflect the exercise of that community's political power.<sup>206</sup> As a concept, transformation cannot be

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(statement of Samuel Issacharoff, Professor of Law, New York University Law School); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10-12 (2006) (statement of Richard Pildes, New York University Law School) [hereinafter *The Continuing Need for Section 5 Pre-Clearance*].

204. See, e.g., J. MORGAN KOUSSE, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 53 (1999) (stating that the VRA is vital to the enforcement of the Fourteenth and Fifteenth Amendments); Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (stating that the VRA is "one of the most effective instruments of social legislation in the modern era of American reform"). See generally ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 264-66 (2000).

205. See Albert Camus, *The Myth of Sisyphus*, in THE MYTH OF SISYPHUS AND OTHER ESSAYS 88, 91 (Justin O'Brien trans., 1955). In this myth, the gods condemned Sisyphus to spend every day rolling a rock up a hill, only to have the rock fall to the bottom, requiring Sisyphus to begin his labors endlessly yet again.

206. The idea for the term "transformation" is partly drawn from the program of reform of government and economic institutions in South Africa. See *Bato Star Fishing (Pty) Ltd. v. The Minister of Envtl. Affairs* 2004 (2) SA 616 (CC) at 3 (S. Afr.). There, the term relates to a broader

easily characterized as a goal that is purely “procedural” or “substantive” in the manner that these terms are commonly employed in scholarly discussions. Instead, transformation takes aim at the basic structures and practices that inform governing institutions.

A crucial element of transformation is that it is sensitive to the problems associated with path dependence in institutions. Covered jurisdictions are home to governing institutions that have historically excluded or limited the political involvement of racial minority groups over decades. The enduring effects of this long term exclusion are not comprehensively addressed by simply changing procedural rules. Such changes do not address the enduring advantages and opportunities that the institutional structure has provided for favored groups. Traditional voting rights remedies have certainly improved such systems with procedural changes, but their reforms accept as given much of the underlying structures in institutions. They do not encourage a more comprehensive consideration of the effects of years of institutional exclusion. Put differently, these traditional reforms do not encourage jurisdictions to start afresh in redesigning governing structures.

A transformed jurisdiction would ensure access to racial and political groups in a given jurisdiction to join deliberations about the merits of proposed electoral rules and procedures. Further, transformation would call attention to the likely results of a change in minority communities as an indication of its merit.<sup>207</sup> Most importantly, transformation offers a specific target that can guide jurisdictions that wish to emerge from the preclearance system. The point of transformation is to organize jurisdictions to do the work of protecting minorities themselves; it would ultimately obviate the need for federal oversight.

### *B. The Means for Reinvention*

Aside from setting a specific goal for a reinvented preclearance system, a proposal must also take serious account of the ways that covered jurisdictions can achieve this end. This aspect involves developing incentives for stakeholders in the relevant unit (in the 1990s version, this consisted of employees, end-level customers, and cabinet level officers). Unlike traditional command policies, which can invite opposition and shirking by those who execute the strategy, reinvention tends to harness the traditional interests within the targeted institution.<sup>208</sup> At the same time, reinvention advocates in the Clinton era also

effort to shift a greater share of financial power to black Africans who were excluded from enjoying the wealth under the apartheid regime. This idea also is similar to the concept of unitary status in the school desegregation cases, in which courts have established a benchmark that determines when a school district no longer requires federal oversight.

207. Importantly, I mean to distinguish a concern about quotas from the one advanced here; as the Court has itself acknowledged, the likely effects of a proposed change on minority communities is a relevant consideration in assessing its viability under Section 5.

208. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 13 (1995) (noting that command policies are a remnant of the Brownlow Commission,

championed the adoption of quantifiable metrics within each agency to gauge performance over time.<sup>209</sup> These measures assess matters that are relevant to improving efficiency in the short term and chart the agency's overall progress in achieving its goals in the long term.

Reinventing preclearance can utilize both of these features in order to improve the existing system. First, the provision should take a more explicit account of the relevant stakeholders in the process. The current system empowers only two major players in a formal preclearance review—state officials and the DOJ. But these are not the only groups with significant stakes in the outcome of a review; the concerns of minority voters, minority representatives, and the political parties are all relevant to whether a proposed change in election law will actually be enacted.<sup>210</sup> However, they may normally play only a background role in determining whether a change violates the provision.<sup>211</sup>

As the preceding discussion suggests, the additional groups that are only indirectly involved in the preclearance process might be interested in playing a more formalized role in election policy development. Perhaps because they are not fully involved in the review stage of the process, they also do not often find common cause with each other. To break the logjam, Section 5 should develop incentives that help to align these interests. One way of doing so is by encouraging two cultural norms in local jurisdictions—cooperation and deliberation.<sup>212</sup> These incentives serve the overall goal of transformation in that each requires actors to pay due regard to the interests of racial minorities, along with their other self-interested concerns.

Further, a reinvented preclearance system should provide better guidance for jurisdictions that wish to emerge from federal review. Assuming that transformation is the appropriate goal of the system, the internal workings of Section 5 should all serve that aim. However, the current system does a rather poor job of providing specific guidelines for obtaining what some of the 2006

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which saw “‘policy’ as the joint domain of the President and Congress, whereas ‘administration,’ it asserted, must be under the direct and exclusive command of the President”); *see also id.* at 112 (explaining that reinventionist economic policies encourage “government (a) to create economic incentives to engage in socially desirable conduct, and (b) to permit the market to decide how companies respond to those incentives”).

209. *See id.* at 6-7 (describing Clinton administration’s executive orders asserting centralized control over the regulatory process and evaluating Clinton’s executive order as part of a “reinventing government” program).

210. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668-87 (1998).

211. Indeed, the Supreme Court has also denied these actors formal input in the review process by denying lawsuits by any of these actors to challenge the DOJ’s administrative decision under Section 5 to permit a proposed election change despite potential discrimination concerns. *See Morris v. Gressette*, 432 U.S. 491, 504-05 (1977).

212. In the final Part of this paper, I describe specific structural innovations in the preclearance system to encourage both of these norms in covered jurisdictions. *See infra* Part IV.C.

opponents described as the “clean bill of health.”<sup>213</sup> Much of the problem relates to the ongoing conflict about how to tell when a jurisdiction has done enough to merit a bailout.

Evident in both of the congressional reenactments of the VRA was an empirical debate about judging the effectiveness of the existing system.<sup>214</sup> To recount the problem briefly, Section 5 opponents argued that improved minority registration and voting rates, coupled with the declining number of federal objections to proposed changes, showed that some of the covered jurisdictions no longer required oversight.<sup>215</sup> Advocates of Section 5 viewed the same information with greater skepticism, claiming that this evidence merely showed that preclearance had effectively deterred possible violations.<sup>216</sup> Facing an impasse, the majority rejected possible amendments to change the coverage and bailout provisions and left the existing system (with little chance for state jurisdictions to effectively exit the system) unchanged.<sup>217</sup>

Disagreements about the value of metrics pose an intractable political problem.<sup>218</sup> One cannot test the validity of the opponents’ claims without dismantling the preclearance system. At the same time, leaving the system in place without a clear way to assess progress prevents even the most ardent Section 5 advocates from credibly defending the provision’s effectiveness. A reinvented system should establish criteria that reflect concerns of both opponents and supporters of the current preclearance system, with the understanding that states may pursue these metrics in order to achieve transformation. Some factors may include the measures that were proposed during the enactments, but advocates could contribute additional indicators that

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213. See generally Katz, *supra* note 54. Some scholars have proposed ways of interpreting the present statute to permit more jurisdictions the ability to bail out, and the Court itself has recently allowed local jurisdictions that are nested in covered states to bailout of the preclearance process.

214. See, e.g., Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 394 (2008).

215. See generally *An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 95, at 8-10 (statement of Richard L. Hasen, Professor of Law, Loyola School of Law); *The Continuing Need for Section 5 Pre-Clearance*, *supra* note 203, at 13-14 (statement of Samuel Issacharoff, Professor of Law, New York University Law School).

216. See *supra* note 204 and accompanying text.

217. See Clarke, *supra* note 214, at 394 (stating that “the record shows that this discrimination is systemic and widespread in the covered jurisdictions, appearing at all levels of government including city, county, and state levels”).

218. Attempts to increase coverage by altering the coverage formula failed because those seeking to expand coverage found it impossible to design a neutral trigger that would expand coverage without inciting strong political opposition. Attempts to alter the bailout provision to mollify critics who claimed that bailout was too stringent failed because there was fear it would also accidentally release “bad” jurisdictions from coverage. And any attempt to change the preclearance procedure would have turned into an unending debate on the purpose and utility of Section 5 itself.

assure the full incorporation of minority political interests.

Interestingly, some aspects of the 2006 extension point in this direction. One part of the statute provides funding for a DOJ study to track the extent to which covered jurisdictions have improved levels of minority political participation.<sup>219</sup> However, this directive is silent on the actual measures that are relevant in this review. In particular, no guidance is offered on whether matters like registration rates, preclearance objections, or racial polarization should be included in the assessment. By identifying an overall goal for the preclearance process and also seeking meaningful input from preclearance stakeholders about methods of measuring progress, the DOJ's recommendations can gain considerable legitimacy and avoid another reenactment debate. Accordingly, the metrics for the reinvented program should reflect the consensus view of these groups with interests in a jurisdiction's preclearance compliance.

### *C. Developing Innovative Reform Ideas*

Finally, a reinvented preclearance system should encourage stakeholders to seek innovative ways to transform electoral structures. The ultimate success of the 1990s' reinvention program was its ability to spur a sustained effort within agencies to improve their operation through innovation. The bulk of this work was carried out not by Washington officials but by workers in the heart of the relevant agencies.<sup>220</sup> Ideas for improvement were based on the desires of the agencies' workers, which meant that solutions were tailored to the context of the agency. The government agency experience indicates what shifting cultural norms can accomplish over the long term. The standard operating procedure within a reinvented organization is to pursue innovative ways to accomplish tasks more effectively.<sup>221</sup>

The functions of the preclearance system could improve by incorporating this feature of reinvention as well. Among the most significant problems with the competing interests in the present system is that there is very little incentive for any actor to introduce new ideas to improve elections in a covered jurisdiction. The reason is that multiple political interests must be satisfied in order to approve a plan; additionally, there is inherent uncertainty in the federal review process. Put plainly, changing the system increases the chances that the jurisdiction will land in a courtroom. Faced with these barriers to innovation, election officials have little reason to reconsider the established election rules and structures.

This result is a lamentable by-product of an otherwise defensible system. The genius of Section 5 is that it freezes existing structures in place to prevent states from adopting more harmful laws.<sup>222</sup> However, one cost is that the process can also stymie momentum for new policies that might actually improve the

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219. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577.

220. See KAMENSKY, *supra* note 153.

221. See Breul & Kamensky, *supra* note 149, at 1013-14.

222. See Shaw v. Reno, 509 U.S. 630, 657 (1993).

political system. The inherent adversarial culture among stakeholders in some preclearance jurisdictions can resemble trench warfare—and a common result of these skirmishes is a stalemate. The jurisdiction, meanwhile, makes only the most minimal progress toward reforming its system. At the close of an enforcement period, it is no small wonder that these stakeholders differ greatly about the need for federal oversight.

The politics of a reinvented preclearance system would promote cooperative behavior among the different interests present in a particular jurisdiction. Sometimes those interests would emphasize race, partisanship, or both.<sup>223</sup> Reinvention would encourage the search for effective means of improving election structures so that the stakeholders themselves can take responsibility for election management. This change does not require a wholesale embrace of either side's position in the reenactment debates. Rather, it depends upon the willingness of each camp to find some particular benefit in the mutual goal of transformation. The traditional opponents can view these innovations as steps toward the jurisdiction's emergence from federal oversight. And the proponents of preclearance can view the same programs as more permanent protections that assure meaningful participation for racial minorities at all stages of the political process.

Some concrete examples of such innovations should be informative. Taken from three different states that are part of the preclearance regime, these policies show how jurisdictions may craft their own ways of entrenching the incorporation of racial minorities. Admittedly, the scope of the institutional changes reviewed here is relatively minor (partly due to the internal political roadblocks). But the examples they suggest that a more robust level of innovation is possible if reinvention is taken seriously in a future legislative session focused on Section 5.

1. *Constitutional Revisions.*—An innovation agenda can include enacting constitutional changes that assure consideration of the interests of racial minorities in developing election policies. Following its prolonged redistricting litigation of the 1990s, North Carolina's legislature recognized the inherent inefficiency in enacting district maps that would almost immediately face multiple court challenges.<sup>224</sup> The state did not receive final judicial approval for all of its legislative districts until shortly before the start of the 2000 line-drawing process.<sup>225</sup> Much of the debate concerned claims that the state had violated certain racial fairness norms.<sup>226</sup> Not only did the courtroom wrangling cost the state valuable time and money; it also damaged political alliances across lines of race and party that might have otherwise pursued a broader substantive agenda.

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223. See generally Tucker, *supra* note 69 (discussing both minority and bipartisan efforts in the reauthorization of the VRA).

224. See Richard L. Hasen, *You Don't Have to Be a Structuralist to Hate the Supreme Court's Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465, 468 (2010).

225. See Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 154-56 (2009).

226. *Id.*

To avoid this problem, the legislature adopted a series of reforms in its redistricting provisions to avoid the problem of multiple, never-ending lawsuits. First, the changes included a jurisdictional provision to prevent state court litigants from forum shopping and created the potential for consolidating multiple claims.<sup>227</sup> A challenge to any redistricting plan would be filed in a single court in the state's capital, and the hearing would be conducted by a specially appointed panel of state judges representing the three major regions of the state.<sup>228</sup> Most importantly, the legislature added a provision laying out the substantive priorities that would guide the redistricting process in future years.<sup>229</sup> First among these priorities was compliance with the federal rule of protecting the interests of racial minority groups.<sup>230</sup>

North Carolina's strategy of constitutional revision is not unique, but it was the first to fundamentally shift the interests of stakeholders in a preclearance jurisdiction. Democrats and Republicans alike endorsed this reform because they saw specific benefits in this legislation. The jurisdictional rule is sensitive to the correlation between region and partisanship in the design of the court panel, which combined judges from the heavily Republican western counties with those from the more Democratic eastern counties. The state entrenches the minority community's participation in the redistricting process, which is a positive factor in federal review. Additionally, the constitutional priorities for districts require attention to multiple legal considerations—including racial fairness. In answer to those who desired a constraint on traditional gerrymandering, for example, the rules directed line-drawers to avoid separating counties wherever possible.<sup>231</sup> By making the protection of minority political power a primary responsibility, the system assures that legislative and community representatives of black voters will have a hand in shaping the contours of election districts.

2. *Non-Political Actors.*—A more common innovation route is creating non-partisan bodies to make important structural decisions about elections. Today, several states employ some form of independent commission in the process of designing election districts. Arizona, a Section 5 state, is a typical example. Members of the state redistricting commission include two nominees from each political party and one independent.<sup>232</sup> The bipartisan group develops a plan for state and federal election districts following a series of public hearings that involve a variety of community input.<sup>233</sup> In addition to using witness testimony to inform its decisions, the commission also follows criteria defined by statute.<sup>234</sup>

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227. See *Redistricting Overview*, N.C. GEN. ASSEMB., <http://www.ncga.state.nc.us/GIS/RandR07/Overview.html> (last visited Nov. 14, 2010).

228. *See id.*

229. *Id.*

230. *See id.*

231. *Id.*

232. See Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 578 (2003).

233. *Id.* at 578-81.

234. *Id.* at 580 (citing ARIZ. CONST. art. IV, pt. 2, § 1(23)).

The idea behind this innovation is that the political institutions in government are overrun by partisan actors who are subject to the pressures of re-election. In service to their party, legislators and governors may resort to manipulating the district drawing process without regard to the concerns of the voting public. The advantage of commissions is that they insulate these decisions from the undue influence of partisanship and gridlock.

A reinvented preclearance system could empower commissions to address a wider number of election policy choices. Like redistricting, several other issues have inherently political consequences that have the potential to hopelessly divide legislatures by both party and race. The implementation of photo identification requirements and vote-by-mail statutes, for example, are as appealing to one party as they are threatening to another. Each of these policies also raises major concerns for its effect on the political power of racial minority groups. By removing the most severe partisan pressures, a commission can consider these policy ideas on their merits and reach decisions that reflect the best interests of the jurisdiction as a whole.

A related point to make about this approach is that commissions need not have final decision-making authority to work. Like budget office ratings, a commission's findings can be just as effective in an advisory capacity. Advisory commissions can pressure political institutions to take account of certain interests that might otherwise be ignored. Christopher Elmendorf has explored how the operation of advisory bodies can enhance important policy choices in a variety of settings.<sup>235</sup> Among them is the constraint on political institutions that can be inclined toward manipulating existing rules for partisan advantage.<sup>236</sup> To the extent that these bodies can reflect the level of diversity present in the jurisdiction, advisory commissions may be a positive influence on the work of traditional political institutions.<sup>237</sup> This role can also constrain any effort by parties to supplant the principle of racial fairness in the political process.

3. *Mini-VRAs*.—Finally, innovation strategies can improve the system by replicating the basic structure of the federal government's voting rights remedies. As with the antitrust arena, voting rights advocates can develop a set of "mini-remedies" that support and enhance protections available in the federal system.<sup>238</sup> In this regard, California legislators approved a law that created the first state-based voting rights act in the country.<sup>239</sup> The California Voting Rights Act (CVRA) supplements rights and remedies that are currently available under the federal Voting Rights Act.<sup>240</sup> Among other things, the statute entitles groups to

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235. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1386-94 (2005).

236. See *id.* at 1405-17.

237. *Id.* at 1417.

238. See, e.g., Joaquin G. Avila et al., *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 152 (2007) (stating that the California Voting Rights Act is a significant improvement over Section 2).

239. *Id.*

240. See *id.*

sue even when they are too geographically dispersed to elect a candidate of choice from a single member district in a county.<sup>241</sup> By providing evidence of racially polarized voting, a plaintiff is entitled under the CVRA to judicial remedies that include (but do not require) the imposition of proportional voting systems in county governments that would prevent minority vote dilution.<sup>242</sup>

This type of innovation serves both substantive and procedural interests. Substantively speaking, the CVRA expands the field for minority voters to pursue greater levels of political power. By eliminating the geographic concentration requirement that exists in federal law, the state leaves open the possibility that a court may find that an appropriate remedy might be an election model such as cumulative voting. Several scholars have found that these approaches offer more access for racial minority groups.<sup>243</sup>

There are procedural benefits from this kind of approach as well. First, the statute offers a greater chance for experimentation with alternative systems of political representation.<sup>244</sup> By adopting new election structures in county governments, scholars and policymakers can examine the effects of employing different remedies in a political system. Specifically, these studies can consider the extent to which these reforms change political mobilization, party divisions, and policy responsiveness. That information can be helpful for future cases in which courts must consider the merits of applying these remedies in other jurisdictions, and it can vastly enhance policy discussions about the propriety of incorporating these structures into the state's normal election scheme.

Perhaps most importantly, adopting this kind of innovation can further the jurisdiction's march toward a day when it legislates without federal oversight. Section 5 opponents who want to demonstrate that a state no longer requires coverage might well rely upon the adoption of internal review structures as the most tangible proof that minority concerns will continue to be addressed in election-related decisions.<sup>245</sup> For their part, racial minority groups and other advocates of Section 5 should be willing to accept state-based remedial protection so long as it allows them to maintain a seat at the table during the policymaking process. With a commitment that these structures will be permanent parts of the state's system, this innovation would eliminate the uncertainties of a temporary federal protection. No longer would advocates face the awkward position in reenactments of conceding progress in gaining access to the political system while also enumerating multiple ways that the jurisdiction has fallen short.

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241. See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (holding that the federal Voting Rights Act makes the geographic concentration of a racial group one of the prerequisites for seeking statutory remedies available under Section 2).

242. CAL. ELEC. CODE §§ 14025-14032 (West 2009).

243. Such scholars, including Michael S. Kang, Lani Guinier, Kathleen L. Barber, and Lee Romney, suggest that cumulative voting or "instant runoff" voting is way to ensure minority representation.

244. CAL. ELEC. CODE §§ 14025-14032 (West 2009).

245. See *supra* note 203 and accompanying text.

## CONCLUSION

This Article has developed in broad strokes the basis for an alternative system that Congress may use to guide any future reconsideration of the preclearance system. The politics around this statute are exceedingly high stakes, and the battle lines on this issue are exceedingly well-defined. Added to this is the volatile confluence of the partisanship with race, which makes any consideration of a new approach to policymaking a tough sell. Yet necessity (like politics itself) tends to make strange bedfellows. The potential for a challenge to the constitutionality of the preclearance system makes revisiting the VRA a priority.

Given the present risks inherent in simply reenacting past debates about the statute, this Article invites legislators to consider adopting reinvention as an approach. If for no other reason, the strategy provides each side in the traditional debate with something to embrace. For opponents who long for the day that the federal government plays no role in its decisionmaking, the approach helps identify the steps necessary to reach that goal. Fairly reflecting the desires of all the stakeholders in preclearance, the approach would provide a tangible route to a “clean bill of health.” At the same time, those who have ardently fought to defend the preclearance system can appreciate the commitment to devise permanent tools that will entrench access to minority political power. With structures in place to encourage cooperation across lines of race and party, a reinvented system will promote transformed jurisdictions that give full meaning to the principles of preclearance.



# AFTER *CITIZENS UNITED*

MICHAEL S. KANG\*

## INTRODUCTION

*Citizens United v. FEC*<sup>1</sup> may prove to be the most important campaign finance decision in decades as a critical step in a transformation of campaign finance law under the Roberts Court. The decision explicitly overruled longstanding Court precedent and struck down as unconstitutional federal prohibitions on the use of corporate treasury funds for campaign finance expenditures in connection with federal elections.<sup>2</sup> In short, federal law that blocked corporations from spending treasury funds on federal campaign speech was struck down, and by extension, similar state laws modeled after federal law also were struck down as they applied to state and local elections.<sup>3</sup> Although the immediate public reaction focused on the potential for increased corporate spending in elections, the much larger importance of the case is the signal from the Court about the direction of campaign finance law going forward.

The doctrinal payoff of *Citizens United* is a substantial narrowing of the government interest in campaign finance regulation. The permissible grounds for campaign finance regulation had subtly expanded under the Rehnquist Court, which consistently deferred to the government and upheld a variety of campaign finance regulations.<sup>4</sup> *Citizens United*, reflecting Justice Kennedy's views previously expressed mainly in dissent, represents the Roberts Court's clear reversal of that trend and a narrow focus on quid pro quo corruption as the exclusive grounds for government regulation.<sup>5</sup>

Although much of the immediate reaction to *Citizens United* focused on the decision's short-term impact on political spending, the doctrinal impact of the decision is likely to be more significant. There were several cases rising up through the lower courts whose complexions were transformed by *Citizens United* and the ascendance of Justice Kennedy's views on campaign finance law.<sup>6</sup> Although the degree to which the Roberts Court will extend the basic logic of Justice Kennedy's majority opinion in *Citizens United* is of course uncertain, the

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1. 130 S. Ct. 876 (2010).

2. *Id.* at 913.

3. *See id.*

4. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876; *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

5. *Citizens United*, 130 U.S. at 908.

6. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 699 (9th Cir. 2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010), *petition for cert. filed*; *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 8 (D.C. Cir. 2009).

application of *Citizens United* to these cases could transform campaign finance law as it has stood for decades.

In Part I, I explain that *Citizens United* itself is markedly detached from political reality. *Citizens United* reinforces and depends upon the greatest absurdity of campaign finance law—that independent expenditures pose no threat of campaign finance corruption. In Part II, I explore the doctrinal consequences of *Citizens United* for the future of campaign finance law. I explain that if extended to its logical extremes, *Citizens United* undercuts the constitutionality of much campaign finance regulation. As a result, *Citizens United* is an important signal of the Roberts Court’s direction in this area and may be a turning point in the development of campaign finance law.

### I. THE MEANING OF *CITIZENS UNITED*

*Citizens United* struck down as unconstitutional federal prohibitions on corporate expenditures in connection with federal elections.<sup>7</sup> The case arose when Citizens United, a small corporation with a budget of \$12 million, funded a ninety-minute documentary about then-Senator Hillary Clinton, who was a candidate for the Democratic presidential nomination in 2008.<sup>8</sup> Citizens United sought to release the documentary on cable video-on-demand, as well as broadcast television advertisements for the documentary, within thirty days of the 2008 primary elections. However, as a corporation, Citizens United was prohibited under federal law<sup>9</sup> from publicly distributing what amounted to electioneering communications in the form of the documentary and advertisements.<sup>10</sup> Citizens United initially challenged the federal prohibitions on several grounds, including the claim that cable video-on-demand did not constitute a prohibited public distribution, but it did not press the Court on the facial constitutionality of the federal prohibition on corporate electioneering. After oral argument, though, the Court surprised nearly everyone by ordering rebriefing and reargument on this larger question.<sup>11</sup> Only after a second briefing and argument, the Court decided in *Citizens United* that there was no constitutional basis for “allowing the [g]overnment to limit corporate independent expenditures.”<sup>12</sup>

The majority opinion in *Citizens United* framed the basic issue of the case as whether “the [g]overnment may impose restrictions on certain disfavored speakers”<sup>13</sup>—namely, corporations—but in so doing, the Court asked the wrong

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7. *Citizens United*, 130 S. Ct. at 913.

8. *Id.* at 887.

9. 2 U.S.C. § 441b(b)(2) (2006), invalidated by *Citizens United*, 130 S. Ct. at 913.

10. *Id.* § 434(f)(3) (defining “electioneering communication” as any “broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for [f]ederal office” made proximate to an election, targeted to the relevant electorate).

11. *Citizens United*, 130 S. Ct. at 888.

12. *Id.* at 913.

13. *Id.* at 899.

set of questions. Corporations are not the relevant actors whose rights we ought to be concerned about protecting. Corporations are not people, nor are they entitled to all the constitutional rights of individual citizens. But as many supporters of *Citizens United* correctly argue, we nonetheless invest institutions such as corporations and political parties with constitutional entitlements when it appropriately serves the rights of individuals who constitute those institutions. And yes, corporate expenditures would be a more efficient way for shareholders to convert treasury funds into political speech. However, all campaign finance regulation complicates the ability of shareholders and other individuals to direct funds to political speech. In other words, the fact that a government restriction makes shareholder speech more difficult is obviously insufficient by itself to justify a constitutional prohibition of that restriction—we need to know much more about how shareholders' expressive interests are compromised, if at all, to a degree that requires the Court to intervene.

It is unclear how shareholders are inappropriately disadvantaged by prohibitions on corporate expenditures struck down in *Citizens United*. Shareholders are not disadvantaged by their decision to incorporate, because they always remain free to make independent expenditures on an unlimited basis in their individual capacity, just like non-shareholders and everyone else. The analysis might be different if shareholders were in a worse position than non-shareholders, but they are not. Just as non-shareholders can aggregate funds through a political action committee (PAC) or political party, so too can shareholders. Perhaps the government should allow corporate expenditures and simply expect non-shareholders to incorporate as well, but whether the Constitution prohibits the government from refusing to do so is a different matter.

What functional difference does *Citizens United* achieve by permitting corporations to spend treasury funds on independent expenditures? A key difference is that shareholders obtain the advantage of streamlined aggregation through the corporation, as opposed to other entities. For non-shareholders to aggregate their money, they must pool funds, subject to personal income tax, by contributing individually to a PAC or political party. The PAC or party collects their pooled money, but it does so only subject to applicable restrictions on contributions under campaign finance law. By contrast, the post-*Citizens United* corporation may serve as both a source of funds and the pooling entity for those funds all at once for its shareholders. It can pool shareholder money simply by retaining earnings, instead of distributing dividends to shareholders who would then need to aggregate those funds through a separate entity. This streamlined aggregation not only lowers transaction costs, but also uses pre-tax dollars (for purposes of personal income tax) and bypasses restrictions on contributions.<sup>14</sup>

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14. To the degree that the corporation's major purpose becomes making or receiving contributions and expenditures, the corporation may be classified as a "political committee" under federal campaign finance law that is subject to contribution limits. However, it is not clear at the moment that even such a corporation would be limited in the amount of its own independent expenditures out of its treasury funds. Thanks to Allison Hayward for suggesting this footnote.

Aggregation through PACs and parties is quite inefficient by comparison. It is therefore difficult to understand why shareholders should be constitutionally entitled to this advantage. And it is also difficult to understand why speech by PACs and political parties, whose First Amendment credentials are at least as strong in this context as for-profit corporations, would receive less constitutional protection.

The justification, according to *Citizens United*, is doctrinal consistency with *Buckley v. Valeo*.<sup>15</sup> *Citizens United* strives for consistency with the original determination in *Buckley* that there is no government interest in limiting independent expenditures.<sup>16</sup> According to *Buckley*, independent expenditures present no risk of corruption, and therefore government regulation restricting independent expenditures is unconstitutional regardless of the funding source.<sup>17</sup> Of course, in *Austin v. Michigan Chamber of Commerce*, the Court engaged in doctrinal calisthenics to avoid this conclusion and upheld a prohibition on corporate expenditures.<sup>18</sup> *Citizens United* overruled *Austin* for this reason and mocked it as “not well reasoned.”<sup>19</sup> Although this criticism is understandable in certain respects, *Citizens United*’s confidence in the original correctness of *Buckley* is not. If *Austin* was not well reasoned, exactly the same can be said about *Buckley*.

*Buckley* is absurd as a matter of political reality in its constitutional assertion that contributions are potentially corrupting, but that independent expenditures are not at all.<sup>20</sup> *Citizens United* depends on this absurdity from *Buckley*, without any reservation about its unreality.<sup>21</sup> Notably, Justice Kennedy devoted only a single paragraph from his fifty-six-page majority opinion to dismissing the relevance of his recent majority opinion in *Caperton v. A.T. Massey Coal Co.*,<sup>22</sup> which recognized the corrupting potential of independent expenditures.<sup>23</sup> Of course, *Caperton* involved a different remedy than the government sought in *Citizens United*,<sup>24</sup> as Justice Kennedy notes, but both cases hinged on a critical judgment about the plausibility of corruption from independent expenditures. In *Caperton*, Kennedy’s answer was basically yes. Only a year later in *Citizens*

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15. See *Citizens United*, 130 S. Ct. at 913.

16. *Id.* at 902 (citing *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976)).

17. *Buckley*, 424 U.S. at 46, 51.

18. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1970), overruled by *Citizens United*, 130 S. Ct. 876.

19. *Citizens United*, 130 S. Ct. at 912.

20. See *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 47 (1998).

21. See *Citizens United*, 130 S. Ct. at 909 (concluding “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

22. 129 S. Ct. 2252 (2009).

23. *Citizens United*, 130 S. Ct. at 910 (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009)).

24. *Id.*

*United*, his answer was no. There are ways to distinguish the cases, but the summary dismissal of *Caperton* is utterly unconvincing. If the payoff from *Citizens United* is doctrinal consistency, there is no payoff at all.

The inconsistency between *Buckley* and *Austin*, now resolved by *Citizens United*, was a tension intrinsic to campaign finance law and not necessarily a failing in the actual practice of campaign finance law. Campaign finance law is a compromise in terms of both law and democratic values. It imperfectly expresses tension between abstract notions of liberty and equality. It expresses tension between unease about government restriction of speech on one hand and concern about the influence of economic power on the other hand. The need for campaign finance law to negotiate these tensions—with legal categories that do not fully capture their nuances—accounts for many logical failings of *Buckley*, *Austin*, and *McConnell v. FEC*<sup>25</sup> that are difficult to justify as consistent First Amendment doctrine.<sup>26</sup> However, campaign finance law as a whole, over the course of many cases, arguably sought pragmatic balance between these legal and democratic values. *Citizens United*, by contrast, charts a very different, more doctrinaire course.

Justice Kennedy and Chief Justice Roberts contended that the Court had no choice but to decide *Citizens United* on such broad grounds,<sup>27</sup> but the Court could have dispensed with *Citizens United* on many alternate, narrower grounds. Indeed, *Citizens United*'s legal challenges were focused overwhelmingly on just such narrower grounds. *Citizens United* had dropped its facial challenge to the constitutionality of the prohibition on corporate electioneering communications before the district court and did not try to raise it on appeal.<sup>28</sup> What is more, *Citizens United* did not even cite *Austin* in its jurisdictional statement and later raised the argument that *Austin* should be overruled only incidentally in its briefing on the merits.<sup>29</sup> The Court itself decided to focus on these broader questions and, on its own initiative, ordered rebriefing and reargument on them after initial oral argument.

It also is silly to argue that, in *Citizens United*, the Court had to lump together for-profit and non-profit corporations because of the facts of the case. This argument neglects the important insight that lumping together for-profit and non-profit corporations might have been the Court's decided intention. If the Court desired a narrower ruling limited to non-profits, it could have done so on cleaner facts in *FEC v. Wisconsin Right to Life*<sup>30</sup> or simply waited for a better case—one that did not involve a non-profit that received money from for-profit corporations. The Court's clear insistence on overruling *Austin* in *Citizens United*

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25. 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876..

26. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) (characterizing *Buckley* as an “attempt to solve an analogical crisis by splitting the difference”).

27. See *Citizens United*, 130 S. Ct. at 892; *id.* at 918-19 (Roberts, C.J., concurring).

28. *Id.* at 892 (majority opinion).

29. See *id.* at 932 (Stevens, J., dissenting).

30. 551 U.S. 449, 458-60 (2007).

may therefore be connected to the fact that doing so arguably required lumping together for-profits and non-profits. If that was the underlying judicial intention, it is only more reason to criticize the decision, not defend it.

## II. *CITIZENS UNITED*—LOOKING AHEAD

What does *Citizens United* signify for the future of campaign finance law? Although I have criticized *Citizens United*, another view of Justice Kennedy's majority opinion is that it represents only the first step of a comprehensive rethinking of campaign finance law. *Citizens United* may not make great sense only because the Court is not yet finished with what is a longer process that will extend over many decisions and years. In this part, I present Justice Kennedy's view of corruption as a touchstone for the Court's campaign finance jurisprudence going forward and then apply it to several key issues that courts will face over the next couple years. The ultimate result may be a transformation of campaign finance law under the Roberts Court.

### A. *Justice Kennedy and the Roberts Court*

Campaign finance law is an area of striking divergence by the Roberts Court from the jurisprudence of the Rehnquist Court that preceded it. The Rehnquist Court had become so deferential to the government on campaign finance regulation that Richard Hasen went so far as to call a series of its decisions the "New Deference Quartet."<sup>31</sup> In a line of cases that included *Austin* and *McConnell*, the Rehnquist Court consistently upheld campaign finance regulation under increasingly expansive conceptions of the government interest in preventing actual and apparent corruption. *Austin* upheld campaign finance regulation based on the prevention of a different form of corruption—a distortion of the political discourse from the corrosive effects of corporate money.<sup>32</sup> *McConnell* upheld provisions of the Bipartisan Campaign Reform Act (BCRA) based on the prevention of improper influence and opportunities for abuse that extended beyond the usual concern about quid pro quo arrangements.<sup>33</sup>

The Roberts Court, by contrast, has now struck down campaign finance regulation by 5-4 votes in a series of cases, only the most recent and most dramatic of which is *Citizens United*. The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito produced a clear rightward shift in the Court's campaign finance decisions.<sup>34</sup> In

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31. Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 68 (2004).

32. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

33. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 188-89 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876.

34. See Daniel R. Ortiz, *The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV'T L. REV. 141, 142 (2008).

*Randall v. Sorrell*, the Court struck down contribution limits and expenditures in Vermont.<sup>35</sup> In *Wisconsin Right to Life, Inc. v. FEC*, the Court permitted an as-applied challenge to provisions of BCRA already upheld on a facial basis in *McConnell*.<sup>36</sup> Then, in *Wisconsin Right to Life II*, the Court held back from striking down those provisions outright by overruling *McConnell*, but the Court aggressively reinterpreted the holding of *McConnell* to limit the government's ability to regulate corporate and union campaign electioneering.<sup>37</sup> The Court effectively overruled critical provisions of *McConnell*, while denying that fact of the matter. By *Citizens United*, though, a 5-4 majority of the Court eagerly and explicitly acknowledged its overruling of *McConnell* and *Austin*.<sup>38</sup>

Justice Kennedy is the swing vote on the Roberts Court with regard to campaign finance and many other areas of law.<sup>39</sup> His views are quite likely to direct the Court's campaign finance decisions going forward from *Citizens United*, and it is for this reason that *Citizens United* appears to be a turning point for campaign finance law. Justice Kennedy's view on the government's constitutional interest in regulating campaign finance is quite clear—it is focused narrowly on the prevention of quid pro quo corruption. In *McConnell*, Justice Kennedy argued in dissent against the Court's attempt "to establish that the standard defining corruption is broader than conduct that presents a *quid pro quo* danger."<sup>40</sup> In Justice Kennedy's view, only actual or apparent quid pro quo corruption offers sufficient grounds for government regulation because it is the "single definition of corruption [that] has been found to identify political corruption successfully and to distinguish good political responsiveness from bad."<sup>41</sup> Justice Kennedy would therefore have struck down soft money prohibitions on parties who had no direct access themselves to the levers of government and could offer only access and influence to candidates and officeholders who would. The majority in *McConnell* rejected Justice Kennedy's "crabbed view of corruption" as ignorant of "the realities of political fundraising."<sup>42</sup> However, following the replacement of two Justices and the *Citizens United* decision, Justice Kennedy's position appears now to have prevailed on the Roberts Court.

Justice Kennedy's narrow view of corruption has profound implications that sweep across almost every aspect of campaign finance law. In *Citizens United*, Justice Kennedy cited his dissent from *McConnell* and declared assertively that

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35. *Randall v. Sorrell*, 548 U.S. 230, 262-63 (2006).

36. *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 412 (2006).

37. *Fed. Election Comm'n v. Wis. Right to Life, Inc.* 551 U.S. 449, 482 (2007).

38. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913-15 (2010) (overruling *Austin* and part of *McConnell*).

39. See Lee Epstein & Tonja Jacobi, *Super Median*, 61 STAN. L. REV. 37 (2008) (identifying Kennedy as the super median justice on the Roberts Court).

40. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 293 (2003) (Kennedy, J., concurring in part and dissenting in part), overruled in part by *Citizens United*, 130 S. Ct. 876.

41. *Id.* at 297.

42. *Id.* at 152 (majority opinion).

“[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>43</sup> The insufficient connection between the corporate and union prohibitions of 2 U.S.C. § 441b and the prevention of quid pro quo corruption were therefore grounds for unconstitutionality in *Citizens United*. But narrowing the government’s interest in preventing corruption has consequences that extend well beyond the regulations struck down in *Citizens United* because virtually all campaign finance regulation depends on this anti-corruption rationale for its constitutionality.

### *B. Campaign Finance Law After Citizens United*

Taken to its logical extreme, Justice Kennedy’s view of corruption may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders. Only candidates and officeholders possess access to government power that gives rise to the risk of a quid pro quo exchange. As Justice Kennedy argued in *McConnell*, “the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘quids’ in the *quid pro quo* formulation.”<sup>44</sup> In the absence of a contribution to a candidate or officeholder, the government’s interest in regulation might be similarly absent. As a result, under a robust application of this theory, there may be insufficient government interest in regulating contributions to political parties, political action committees, and interest groups when those funds are used only for independent expenditures. Even if the Court does not adopt the narrow view of corruption to this extreme, Justice Kennedy’s view from *Citizens United* will nonetheless have significant influence in many cases that bubble up from lower courts in the years to come.

1. *Contributions*.—As an initial matter, the basic logic of *Citizens United* might apply just as well to corporate contributions as to corporate independent expenditures. Of course, *Citizens United* dealt only with the federal prohibition on corporate expenditures, not the parallel prohibition on corporate contributions.<sup>45</sup> However, *Citizens United* makes clear that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”<sup>46</sup> Indeed, *Citizens United* emphasized the irrelevance of the corporate source of funds in the First Amendment analysis.<sup>47</sup> By extension, the corporate source of a contribution may be irrelevant as well. Although contribution limits might apply to corporate contributions just as they do to individual or committee contributions, it might be difficult to justify a flat discriminatory prohibition on corporate contributions, as a constitutional matter,

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43. *Citizens United*, 130 S. Ct. at 909.

44. *McConnell*, 540 U.S. at 293 (2003) (Kennedy, J., concurring in part and dissenting in part).

45. *Citizens United*, 130 S. Ct. 886.

46. *Id.* at 903.

47. *Id.* at 904.

under the broad language and logic of *Citizens United*.<sup>48</sup>

Even more intriguing are the implications of *Citizens United*'s deeper reasoning for the regulation of contributions as a general matter, whatever their source. The reasoning of *Citizens United* placed great weight on the premises that (1) only contributions to candidates and officeholders pose a threat of quid pro quo corruption; and (2) independent expenditures do not pose that risk.<sup>49</sup> Under this logic, the Court may be skeptical about a risk of quid pro quo corruption inherent in a contribution to someone other than a candidate or officeholder, at least when those funds are not later used to make a contribution to a candidate or officeholder. Put another way, contributions to a non-connected political committee that uses those funds to make only independent expenditures may pose no more threat of quid pro quo corruption than independent expenditures by the initial contributor herself. Neither the independent expenditure, nor the contribution to fund another's independent expenditure, would involve a contribution directly to a candidate or officeholder, and therefore neither scenario would pose the risk of quid pro quo corruption constitutionally necessary for government regulation.

This extension of *Citizens United* was pivotal in a case recently decided by the District of Columbia Circuit involving just such facts. In *SpeechNow.org v. Federal Election Commission*, the D.C. Circuit considered the constitutionality of contribution limits as applied to a non-connected 527 organization that received contributions solely for the purpose of making independent expenditures.<sup>50</sup> The use of contributions to make expenditures had routinely been sufficient for decades under the Federal Election Campaign Act (FECA) and *Buckley* to justify government application of federal campaign restrictions—most importantly, contribution limits—to organizations like SpeechNow. However, SpeechNow did not make contributions to candidates, and thus, following *Citizens United*, it arguably posed no direct risk of quid pro quo corruption in its activities.<sup>51</sup> Under this logic, the D.C. Circuit struck down contribution limits and other restrictions as applied to such groups.<sup>52</sup>

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48. In *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), the Court upheld a federal prohibition on contributions as they apply to MCFL nonprofit corporations, even though such corporations were constitutionally exempt from the federal prohibition on corporate independent expenditures. *Id.* at 163. However, *Beaumont* was decided before *Citizens United* and relied instead on precedent much more suspicious of corporate influence on the political process than *Citizens United*.

49. *Citizens United*, 130 S. Ct. at 908.

50. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010), *petition for cert. filed*; see also *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 699 (9th Cir. 2010) (striking down as unconstitutional limits on expenditures by persons who have received contributions), *petition for cert. filed*; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-93 (4th Cir. 2008) (declaring unconstitutional a state contribution limit as applied to a committee making only independent expenditures).

51. *SpeechNow.org*, 599 F.3d at 696.

52. *Id.*

I argued earlier that *Citizens United* allows for-profit corporations to be more efficient aggregators of campaign funds, mainly because they effectively aggregate without being subject to contribution limits. However, the decision by the D.C. Circuit extending the reasoning of *Citizens United* to SpeechNow allows similar non-connected groups to aggregate without restriction by contribution limits.<sup>53</sup> In other words, *Citizens United* may have advantaged corporations vis-à-vis other types of collective organizations only momentarily until the FEC or courts extend the decision's larger logic to all groups that do not engage in contributions to candidates and officeholders.

2. *Soft Money*.—After *Citizens United*, the unconstitutionality of campaign finance regulation is even clearer for restrictions on money used for purposes other than express campaign speech. *Buckley* limited the constitutionally permissible scope of government regulation to what it called “explicit words of advocacy,” or communications that expressly advocate the election or defeat of a clearly identified candidate for federal office.<sup>54</sup> Campaign money donated to a recipient other than a candidate for office to fund political activities besides express advocacy is called “soft money.”<sup>55</sup> These funds cover a variety of activities ranging from administrative expenses to voter registration drives to “issue advocacy” that stops short of expressly advocating the election or defeat of a particular candidate.<sup>56</sup> Following *Citizens United*, the Court appears poised to roll back regulations restricting soft money.

Soft money does not involve a contribution to a candidate or even fund what the Court considers actual campaign speech in the form of express advocacy. For this reason, soft money is a further step removed from the threat of corruption than contributions to fund independent expenditures, at least under Justice Kennedy’s conception of corruption. Although the Court in *McConnell* permitted government regulation of the receipt and use of soft money by the national parties, *Citizens United* presaged a change in direction, having already overruled part of *McConnell*.<sup>57</sup>

The D.C. Circuit has already begun striking down certain federal regulations concerning the use of soft money by non-connected committees. In *Emily’s List v. FEC*, the D.C. Circuit held that the government could not restrict the use of soft money by non-connected committees to the extent that soft money was used exclusively for purposes other than express advocacy.<sup>58</sup> The FEC had previously attempted to require non-connected committees to fund their administrative expenses, voter drives, and issue advocacy in part with “hard money” collected

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53. See FEC Advisory Opinion 2010-09 (July 22, 2010) (allowing a corporation that intends to make only independent expenditures to accept unlimited contributions from individuals for that purpose).

54. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

55. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 122-23 (2003), *overruled in part by Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

56. *Id.* at 123-24.

57. See *Citizens United*, 130 S. Ct. at 913.

58. *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 25 (D.C. Cir. 2009).

subject to federal contribution limits, source restrictions, and disclosure requirements.<sup>59</sup>

The Supreme Court temporarily stayed its hand at a greater opportunity to strike down federal regulation of soft money as received by political parties in *Republican National Committee v. Federal Election Commission*.<sup>60</sup> In that case, the Republican National Committee challenged prohibitions on the national parties' receipt and use of soft money that was previously upheld in *McConnell*.<sup>61</sup> The U.S. District Court for the District of Columbia upheld these prohibitions again, citing *McConnell* as precedent.<sup>62</sup> The Court's earlier decision in *McConnell*, though, was based in part on a broader view of corruption that Justice Kennedy's opinion in *Citizens United* appears to reject in large part. Now, following *Citizens United*, Justice Kennedy's dissenting views on party soft money in *McConnell* may eventually carry the day with a majority of the Court, but in *RNC v. FEC*, the Court declined to note probable jurisdiction and summarily affirmed the lower court. The facial challenge to the soft money prohibition was not squarely presented in the case, which was framed as an as-applied challenge by the RNC. It is not difficult to imagine this Court striking down the soft money prohibitions if squarely presented with the question, along with full briefing for a facial challenge.

3. *Disclosure*.—The Court has always been more deferential toward campaign finance disclosure requirements than it has been toward outright limits on expenditures, contributions, and soft money. Although the Court struck down the prohibition on corporate independent expenditures in *Citizens United*, the Court upheld federal disclaimer and disclosure provisions requiring corporations to disclose their sponsorship of campaign speech.<sup>63</sup> These provisions, the Court explained, may burden speech to a degree, but they "impose no ceiling on campaign-related activities" or block speech.<sup>64</sup>

The Court's recent decision in *Doe v. Reed* generally signals that even the Roberts Court remains deferential to government compelled campaign disclosure. The Ninth Circuit had upheld the state-required disclosure of signed petitions to qualify a ballot measure that would have repudiated a new state law extending marriage benefits to domestic partners.<sup>65</sup> In *Doe*, the group Protect Marriage Washington argued that public disclosure of signed petitions would subject the signatories to harassment by the ballot measure's opponents,<sup>66</sup> along the same lines as harassment faced by supporters of Proposition 8 in California a couple years ago. Over Justice Thomas's dissent, the Court in *Citizens United* dismissed

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59. *Id.* at 4-5.

60. 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010).

61. *Id.* at 153.

62. *Id.* at 162-63.

63. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913-14 (2010).

64. *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

65. *Doe v. Reed*, 586 F.3d 671, 674, 681 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

66. *Id.* at 676.

a similar risk of harassment as it applied across the board to corporations.<sup>67</sup> Likewise, in *Doe v. Reed*, the Court rejected a facial challenge to Washington's disclosure requirements, finding that the speculative risk of harassment was minor in the case.<sup>68</sup> However, the Court again left open the possibility of as-applied exceptions to prohibit disclosure if it judges the risk of harassment to be significant.

## CONCLUSION

*Citizens United* marks an important turning point in campaign finance law. Under the Rehnquist Court, the government won nearly every major campaign finance case for more than a decade through *McConnell v. FEC* in 2003. However, since Chief Justice Rehnquist's retirement, a 5-4 majority of the current Roberts Court has decided a series of significant campaign finance cases against the government. *Citizens United* signals the direction of the Roberts Court toward a larger rollback of campaign finance regulation.

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67. *Citizens United*, 130 S. Ct. at 980-82 (Thomas, J., concurring in part and dissenting in part) (describing the harassment of supporters of Proposition 8).

68. *Reed*, 586 F.3d at 680-81.

# DISCLOSURES ABOUT DISCLOSURE

LLOYD HITOSHI MAYER\*

## INTRODUCTION

In the wake of the Supreme Court’s foundation-shifting decision in *Citizens United v. FEC*,<sup>1</sup> the media and other commentators could be forgiven for mostly overlooking a second, less controversial holding in that case. By a vote of 8-1, the Court upheld the disclosure and related disclaimer provisions that apply to independent election-related spending even as the Court removed the longstanding bar on corporations (and most likely unions) engaging in such spending.<sup>2</sup> In the relevant portion of the majority opinion, Justice Kennedy, writing for the Court, explained that the government’s interest in providing information to voters was sufficient to justify the required public disclosure of not only Citizens United’s funding of the communications at issue, but also disclosure of who provided significant financial support to that organization.<sup>3</sup> Only Justice Thomas disagreed, arguing that the risk of retaliation against those whose support is revealed by such disclosure is sufficiently real to render legally required disclosure of their identities unconstitutional.<sup>4</sup>

These two contrasting narratives are important because they form the factual basis not only for arguments relating to the constitutionality of the existing campaign finance disclosure rules, but also for legislative debates relating to the advisability of adopting and expanding such rules in the future.<sup>5</sup> Especially given the Court’s decision, supporters of campaign finance regulation are turning more and more to disclosure rules to police campaign fundraising and spending. For example, Congress is considering significantly expanded disclosure and disclaimer requirements for political communications paid for by corporations, unions, and other organizations in the wake of *Citizens United*.<sup>6</sup> Many state

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1. 130 S. Ct. 876 (2010).
2. *See id.* at 914, 931 (Stevens, J., concurring in part and dissenting in part).
3. *Id.* at 914-16.
4. *Id.* at 980-82 (Thomas, J., concurring in part and dissenting in part).

5. For a discussion of the constitutional issues raised by campaign finance disclosure laws, see BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 221-23 (2001); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000).

6. *See, e.g.*, Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. §§ 201-21, 301 (2010) [hereinafter House DISCLOSE Act]; Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S.

legislatures are also considering similar expansions of disclosure and disclaimer rules,<sup>7</sup> and several have already enacted such laws.<sup>8</sup> The constitutional debates also continue, most recently in the ongoing case of *Doe v. Reed*, which involves the disclosure of the names and addresses of individuals who signed a referendum petition in Washington State.<sup>9</sup>

Yet neither the majority nor Justice Thomas provided a firm factual foundation for their respective narratives. The former simply asserted that knowing who supports or opposes a particular candidate “enables the electorate to make informed decisions and give proper weight to different speakers and messages” and provides both “shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”<sup>10</sup> The latter relied heavily on anecdotal evidence of retaliation—specifically, the retaliation against supporters of California’s controversial Proposition 8 relating to same-sex marriage and various attempts to use information disclosed under campaign finance rules to publicly identify supporters of candidates and causes.<sup>11</sup> Justice Thomas markedly failed, however, to cite more broad-based evidence regarding either the actual risk of retaliation (particularly outside of the Proposition 8 context) or the chilling effect, if any,

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3295, 111th Cong. §§ 101-04, 201-31 (2010) [hereinafter Senate DISCLOSE Act]; R. SAM GARRETT, CONG. RESEARCH SERV., R41054, CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 6-7 (Feb. 1, 2010), available at [http://assets.opencrs.com/rpts/R41054\\_20100201.pdf](http://assets.opencrs.com/rpts/R41054_20100201.pdf); see also SUNLIGHT FOUND., A COMPREHENSIVE DISCLOSURE REGIME IN THE WAKE OF THE SUPREME COURT’S DECISION IN *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION* (2010), [http://assets.sunlightfoundation.com/pdf/policy/sunlightfoundation\\_policy\\_citizens\\_united.pdf](http://assets.sunlightfoundation.com/pdf/policy/sunlightfoundation_policy_citizens_united.pdf) (arguing for a robust transparency regime in the wake of the *Citizens United* decision); L. PAIGE WHITAKER ET AL., CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V. FEC*: CONSTITUTIONAL AND LEGAL ISSUES 3-8 (Mar. 8, 2010), available at <http://www.fas.org/sgp/crs/misc/R41096.pdf>.

7. See Fredreka Schouten, *10 States Add Campaign Finance Laws*, ABC NEWS (July 24, 2010), <http://abcnews.go.com/Politics/campaign-finance-laws-emerge-states-disclose-act-stalled/story?id=11234998>.

8. See, e.g., H.R. 2788, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (expanding disclosure requirements for independent expenditures); S. 10-203, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (same); S. 2354, 83d Gen. Assemb., 1st Sess. (Iowa 2010) (same); H.R. 4647, 79th Leg., 2d Reg. Sess. (W. Va. 2010) (same).

9. See *Doe v. Reed*, 130 S. Ct. 2811 (2010) (concluding that a state law requiring disclosure of referendum petitions was constitutional on its face; remanding for a determination whether that law is unconstitutional as applied to a particular petition); see also *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1031-35 (9th Cir. 2009) (concluding that Montana’s “zero dollar” threshold for disclosure of de minimis in-kind contributions was unconstitutional even given the state’s important interest in providing citizens with information about the constituencies supporting and opposing ballot issues).

10. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

11. *Id.* at 980-81 (Thomas, J., concurring in part and dissenting in part).

caused by the fear of retaliation.<sup>12</sup> The precedents cited by the majority and Justice Thomas also do not provide a more solid factual footing for their respective stories.<sup>13</sup>

The purpose of this Article is to consider what we in fact know about the truth of these two narratives. Part I addresses whether the existing disclosure and disclaimer rules result in more informed voters and if they do not, whether any disclosure and disclaimer regime would be more likely to accomplish this goal. This Article looks for the answer to this question in the political psychology literature regarding voter decisionmaking, and particularly the use by voters of “heuristic cues”—mental shortcuts—to reach, arguably, the same decision the voters would reach if they had unlimited time and interest to gather information about their election choices.

Part II addresses the extent to which the existing disclosure and disclaimer rules result in either actual retaliation or sufficient fear of retaliation—whether justified or not—that financial support of candidates is chilled. The answer to this question is less clear, unfortunately, because while anecdotal evidence of actual and possible retaliation exists, little if any empirical research has been done on the actual extent of retaliation and the effect of the fear of retaliation on potential contributors’ behavior. Nevertheless, the existing evidence of retaliation, combined with the more extensive research regarding informing voters, does suggest several changes to existing and proposed disclosure and disclaimer regimes. Such changes could both further the voters’ interest and reduce actual and perceived risk of retaliation.

Part III describes these recommended changes, which include both a reduction in the disclosure of information about “rank-and-file” contributors, whose specific identities have little or no informational value for voters, and an increase in the disclosure of information about substantial contributors, particularly through an expanded use of disclaimers on communications paid for by such contributors or the groups they support.

### I. REWARD: INFORMING VOTERS

The oft-cited trilogy of government interests in disclosure of who financially supports (or opposes) candidates is informing voters, deterring corruption and the

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12. See *id.* at 980-82.

13. *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (asserting without citation that disclosure “provid[es] the electorate with information about the sources of election-related spending”)); *id.* (citing *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003) (noting the use of misleading names by some organizations but otherwise simply accepting the assertion in *Buckley* that disclosure serves to more fully inform voters), overruled by *Citizens United*, 130 S. Ct. 876 (2010)); *id.* at 915 (citing *Buckley*, 424 U.S. at 76 (stating that disclosure serves “to insure that the voters are fully informed”)); *id.* (citing *McConnell*, 540 U.S. at 196) (arguing same); *id.* at 980-82 (Thomas, J., concurring in part and dissenting in part) (citing no precedents that provide additional factual support for the retaliation narrative).

appearance of corruption, and aiding enforcement of campaign spending limits.<sup>14</sup> While there are other possible rationales for disclosure, including determining whether candidates and political parties receive adequate funding, determining the extent of individual (financial) participation in politics, and generally facilitating the study and knowledge of political behavior, it is only these three that have been cited as having constitutional significance.<sup>15</sup>

The focus here will be on the first interest—informing voters—for several reasons. First, the third interest—aiding enforcement of campaign spending limits—only applies when such limits exist (and possibly not even then as to disclosure to the public as opposed to a regulatory body), yet both the existing and proposed federal (and many state) disclosure regimes go well beyond disclosure of financial supporters who are subject to such limits, particularly in the wake of *Citizens United*.<sup>16</sup> Second, there is significant skepticism regarding the extent to which disclosure alone in fact deters hard-to-prove corruption or the appearance of corruption, Justice Brandeis's oft-quoted “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman”<sup>17</sup> notwithstanding.<sup>18</sup> Third, the Court in *Citizens United* chose to rely solely on the

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14. See, e.g., *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66-68, 80-81; Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 38 (2007); Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 239 (2004); Hasen, *supra* note 5, at 270.

15. See K.D. Ewing & N.S. Ghaleigh, *The Cost of Giving and Receiving: Donations to Political Parties in the United Kingdom*, 6 ELECTION L.J. 56, 59 (2007) (listing rationales); David Schultz, *Disclosure is Not Enough: Empirical Lessons from State Experiences*, 4 ELECTION L.J. 349, 355-56 (2005) (same); Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 371, 374-75 (2005) (noting how disclosure has facilitated the study of political behavior).

16. See FEC Adv. Op. 2010-11, at 2-3 (July 22, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf> (opining that a federally registered, independent-expenditure-only political committee can solicit and accept unlimited contributions from a variety of sources); FEC Adv. Op. 2010-09, at 3-5 (July 22, 2010), available at [http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE\\_NO=-1](http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1) (opining that a federally registered, independent-expenditure-only political committee may solicit and accept unlimited contributions from individuals in the general public).

17. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Martino Publ'g 2009) (1913).

18. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 321 (2003) (Kennedy, J., concurring in part and dissenting in part) (rejecting the combating corruption rationale with respect to the disclosure rules at issue); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 27 (2002) (“[M]andated disclosure may make us feel good about ourselves but it does little to insulate the political sphere from the corrupting influence of unequal wealth.”); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 296-302 (rev. ed. 1990) (arguing that disclosure of interest group campaign contributions had the effect of legitimizing and increasing those contributions); Bauer, *supra* note 14, at 40 (arguing that “the rational of ‘deterrence’ . . . holds but cannot prove that disclosure will discourage illegal or corrupt

informing-voters interest in upholding the existing federal disclosure rules at issue in that case.<sup>19</sup>

There fortunately has been significant political-psychology research regarding how voters obtain information relevant to their election decisions, as well as broader research regarding public use of information when making decisions.<sup>20</sup> The story that emerges from this research is much more complicated and nuanced than the Court's statements in *Citizens United* would indicate. It is not simply enough to disclose contributor information. While existing research indicates that such information *may* help inform voters, whether it has a reasonable chance of doing so depends both on *what specific information* is disclosed and *how* that information is disseminated.<sup>21</sup> As political scientist Arthur Lupia puts it with respect to informing citizens generally:

Scholars, legislators, and foundations both public and private advocate various means to enhance competence, including civic education campaigns and the development of informative [websites] . . .

However, something is wrong with many of these attempts. The

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financial relationships between special interests and political actors"); Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 652-53 (2003) (expressing skepticism that campaign finance disclosure rules discourage large donations that have the greatest potential for corruption and the appearance of corruption); Ewing & Ghaleigh, *supra* note 15, at 69; Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669-75 (2002); William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 30-32 (2003); Wilcox, *supra* note 15, at 373 ("Even with disclosure, it is exceeding difficult to *prove* that corruption has occurred, and many observers doubt that corruption is common."). *But see, e.g.*, Hasen, *supra* note 5, at 281, 283 n.78 (appearing to accept the *Buckley* Court's position that at least some communications done independently of candidates raise corruption or appearance of corruption concerns sufficient to justify disclosure of who financially supports those communications); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994) ("Candidates often know who spends money on their behalf, and for this reason, an expenditure may in some contexts give rise to the same reality and appearance of corruption." (internal citation omitted)).

19. *Citizens United v. FEC*, 130 S. Ct. 876, 915-16 (2010).

20. *See generally* Cheryl Boudreau, *Making Citizens Smart: When Do Institutions Improve Unsophisticated Citizens' Decisions?*, 31 POL. BEHAV. 287, 287-90 (2009) (compiling and explaining this research); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1149-51 (2003) (same).

21. *See generally* ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 11 (2007) (concluding that for a targeted transparency policy to be successful, it must be both user-centered and sustainable); *id.* at 55 (arguing that the extent to which available information is used by decisionmakers depends on how much they value the information, the degree to which the information is compatible with their decision-making routines, and how comprehensible it is to them).

problem is that they are based on flawed assumptions about how citizens seek and process information. One manifestation of the problem is that many advocates of competence-generating proposals proceed as if merely providing new information is sufficient to improve competence. However, the transmission of socially relevant information is no “Field of Dreams.” It is not true that “if you build it, they will come.” Nor is it true that if they come, the effect will be as advocates anticipate.<sup>22</sup>

Furthermore, there is still significant uncertainty regarding what information and which means of dissemination are most useful to voters.<sup>23</sup>

Applying this research to the voter information narrative requires starting with two important but generally uncontroversial assumptions (at least in the United States). First, it is desirable for voters to be well-informed about their electoral choices—whether candidates or ballot initiatives—such that voters can accurately determine and apply their personal preferences when making such choices.<sup>24</sup> Well-informed in this context means voters not only having all relevant information, but also understanding that information.<sup>25</sup> Second, many,

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22. Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 LAW & CONTEMP. PROBS. 133, 134 (2002) (internal citation omitted); see also Briffault, *supra* note 18, at 653-55 (expressing skepticism that campaign finance disclosure rules have a significant effect on voter information or voter behavior).

23. See generally James H. Kuklinski & Paul J. Quirk, *Conceptual Foundations of Citizen Competence*, 23 POL. BEHAV. 285 (2001) (identifying a host of problems with the research into, among other topics, how voters use the information they receive).

24. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 5-7, 59-61, 272 (1996) (concluding that “informed citizens are demonstrably better citizens” because, among other reasons, they are “better able to link their interests with their attitudes” and “more likely to choose candidates who are consistent with their own attitudes”); Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 586 (1997) (defining a “‘correct’ vote decision as one that is the same as the choice which would have been made under conditions of full information”); Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 45 (1995) (concluding that the right question to ask with respect to campaign finance regulation is “whether it would increase the amount and quality of deliberate, cognitive decisionmaking rather than just the amount of speech”); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 415 (1998) (“Ideally, then, voters should be able to choose between opposing candidates and their platforms on the basis of ‘the preferences that people would have if their information were perfect.’” (internal citation omitted)). But see Craig M. Burnett et al., *The Dilemma of Direct Democracy* 4 (Univ. of So. Cal. Legal Studies, Working Paper No. 57), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1561926](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561926) (concluding in an empirical study of voting relating to a ballot initiative that most voters, regardless of their level of information, voted in a manner consistent with their policy preferences, although not extending this result to voting in candidate elections).

25. See Kuklinski & Quirk, *supra* note 23, at 301-03 (questioning what it means for an ordinary citizen to be well-informed when making political decisions and whether any significant

and probably most, voters are not well-informed, both because relevant information is often not available or comprehensible and because gathering and processing such information has costs that voters often choose not to incur given other demands.<sup>26</sup> This ignorance extends to basic information about candidates for elected office,<sup>27</sup> although there is an ongoing debate whether recall of such information accurately reflects the information that voters use to make decisions.<sup>28</sup> Given these assumptions, the question that existing and proposed campaign finance disclosure rules raise is whether they in fact help voters become more informed. This discussion will focus on disclosures of contributors who finance efforts to support or oppose candidates, both because *Citizens United* focused on spending relating to candidate elections and because others have already comprehensively considered this issue in the context of ballot initiatives.<sup>29</sup>

The existing disclosure and disclaimer regimes generally collect and make public information in two ways. First, they require candidates, political parties, political committees, and other organizations engaged in certain election-related activities to file public reports identifying financial contributors who have given above certain thresholds.<sup>30</sup> For example, federal election law requires such entities to identify all contributors who provide more than \$200 within a designated period (either a calendar year or a federal election cycle), except that the threshold is \$1000 for non-candidate, non-party organizations, which have to disclose their contributors only because the organization makes “electioneering

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proportion of citizens can truly be said to be well-informed, as opposed to merely relatively informed, compared to their fellows).

26. See, e.g., DELLI CARPINI & KEETER, *supra* note 24, at 269-72 (highlighting the first reason while acknowledging other influences); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 236-37 (1957) (focusing on the second reason); Edward G. Carmines & James H. Kuklinski, *Incentives, Opportunities, and the Logic of Public Opinion in American Political Representation*, in *INFORMATION AND DEMOCRATIC PROCESSES* 240, 244-45 (John A. Ferejohn & James H. Kuklinski eds., 1990) (noting both reasons); Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in *IDEOLOGY AND DISCONTENT* 206, 219-23 (David E. Apter ed., 1964) (detailing a general lack of public knowledge with respect to the liberal-conservative political distinction or how that distinction applied to the two major political parties); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304-15 (2004) (summarizing research demonstrating a general lack of political knowledge and providing further data supporting this finding).

27. See, e.g., Somin, *supra* note 26, at 1308 (summarizing the lack of knowledge about candidates, among other information, in 2000).

28. See James N. Druckman, *Does Political Information Matter?*, 22 POL. COMM. 515, 516 (2005) (describing this debate).

29. See, e.g., Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005).

30. See generally 2 U.S.C. § 434 (2006 & Supp. 2009) (specifying federal disclosure requirements); *Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT (Dec. 31, 2006), <http://disclosure.law.ucla.edu> (cataloguing state campaign disclosure requirements).

communications.”<sup>31</sup> For individuals, the information that must be provided is the person’s name, mailing address, occupation, and employer.<sup>32</sup> All of this information is then made available in an Internet-accessible, searchable database.<sup>33</sup> A search of the Campaign Disclosure Law Database maintained by the Campaign Disclosure Project reveals that every state has similar disclosure laws, although reporting thresholds vary and are usually significantly lower than \$200.<sup>34</sup>

Second, these regimes require the same organizations, when they pay for certain types of communications, to include disclaimers in those communications identifying the organization.<sup>35</sup> For example, federal election law requires covered communications not authorized by a candidate to state the name and permanent street address, telephone number, or web address of the organization (or individual) who paid for the communication, as well as a statement that the communication is not authorized by any candidate or candidate’s committee.<sup>36</sup> Federal election law also requires that radio or television communications by any person or organization other than the candidate or authorized by the candidate include an audio statement that “\_\_\_\_\_ is responsible for the content of this advertising.”<sup>37</sup> A search of the Campaign Disclosure Law Database maintained by the Campaign Disclosure Project revealed that most, although not all, states have similar disclaimer laws.<sup>38</sup>

The disclosure of financial contributors will rarely, if ever, directly inform voters about the qualifications or policy positions of candidates. Rather, such disclosures may indirectly provide such information to voters depending on what the voters know (or believe they know) about the contributors—their judgment, values, and policy positions.<sup>39</sup> Such indirect knowledge is commonly referred to

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31. 2 U.S.C. §§ 434(b)(3)(A), (c)(2)(C), (f)(2)(E). An “electioneering communication” is defined as a certain communication that refers to a clearly identified candidate, reaches a certain number of electorate for that candidate, and is aired within a certain time window before the relevant election. *Id.* § 434(f)(3)(A)(i).

32. *Id.* § 431(13)(A).

33. See FED. ELECTION COMM’N, CAMPAIGN FINANCE DISCLOSURE DATA SEARCH, [http://www.fec.gov/finance/disclosure/disclosure\\_data\\_search.shtml](http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml) (last visited Oct. 15, 2010).

34. See *Campaign Disclosure Law Database*, *supra* note 30 (under “Compare,” scroll down to “F. Contributor Information” and select “7. Is there a threshold amount for reporting individual contributions?,” click “select all” to search all jurisdictions, and click “Next”).

35. See generally 2 U.S.C. § 441d; *The Campaign Disclosure Law Database*, *supra* note 30.

36. 2 U.S.C. § 441d(a).

37. *Id.* § 441d(d)(2).

38. See *Campaign Disclosure Law Database*, *supra* note 30 (under “Compare,” scroll down to “T. Advertisement disclosure” and select “2. Are committees required to disclose their identity on broadcast (TV or radio) advertisements?,” click “select all” to search all jurisdictions, and click “Next”).

39. See Arthur Lupia, *Who Can Persuade Whom?: Implications from the Nexus of Psychology and Rational Choice Theory*, in *THINKING ABOUT POLITICAL PSYCHOLOGY* 51, 56 (James H. Kuklinski ed., 2002) (concluding that “cue-giver attributes . . . affect a cue’s

as heuristic cues.<sup>40</sup> These mental shortcuts permit, in this situation, the voter who learns the identity of a financial contributor to jump to a conclusion regarding the supported (or opposed) candidate's qualifications for office or policy positions based on that contributor's information. Commonly identified heuristic cues include party affiliation, endorsements by interest groups, newspapers, celebrities, politicians, and other opinion leaders, and a candidate's personal characteristics and character.<sup>41</sup>

This brief description of heuristic cues suggests their limitations both generally and specifically with respect to contributor information. Perhaps most importantly, not all scholars who have studied this issue are convinced that all or most identified heuristic cues in fact tend to lead voters to act as they would if they were better informed.<sup>42</sup> These skeptics argue that cues may lead to

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persuasiveness only if they are necessary to inform a cue-seeker's perceptions of a cue-giver's actual knowledge or interests").

40. See ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 37 (1998) (listing and agreeing with studies showing that voters use simple shortcuts when making complex decisions); SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 44 (1991) (describing the use of "information shortcuts" by voters); PAUL M. SNIDERMAN ET AL., REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY 19 (1991) (describing heuristics generally); Boudreau, *supra* note 20, at 289 (summarizing research about such cues); see generally Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (discussing the state of research into intuitive, as opposed to reasoning, decisionmaking).

41. See, e.g., LUPIA & MCCUBBINS, *supra* note 40, at 7-8 (listing possible heuristic cues identified by scholars); Kuklinski & Quirk, *supra* note 23, at 295 (same); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 953-54 (2001) (dividing commonly considered candidate heuristic cues into five categories: party affiliation, ideology, endorsements, "viability" information from polls, and visual appearance); Victor C. Ottati & Robert S. Wyer, Jr., *The Cognitive Mediators of Political Choice: Toward a Comprehensive Model of Political Information Processing*, in INFORMATION AND DEMOCRATIC PROCESSES, *supra* note 26, at 186, 211-14 (reviewing commonly identified heuristic cues for candidates, including party affiliation and image).

42. See, e.g., DELLI CARPINI & KEETER, *supra* note 24, at 53-55 (arguing that while commonly cited heuristic cues, such as political party affiliation, are valuable, they alone are not sufficient to permit voters to act if they were well-informed); James H. Kuklinski & Norman L. Hurley, *On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking*, 56 J. POL. 729, 732-33 (1994) (noting the limited effectiveness of the views of political elites as heuristic cues); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 153, 155-59, 165-67 (Arthur Lupia et al. eds., 2000) (questioning whether some of the claimed benefits of political heuristic cues actually exist, although not denying that they may be helpful to voters); Lau & Redlawsk, *supra* note 41, at 966-67 (concluding that political heuristic cues may tend to mislead less politically sophisticated voters generally and even relatively politically sophisticated voters in certain situations); Somin, *supra* note 24, at 421-23

incorrect conclusions about a candidate; for example, given the breadth of positions held by candidates identified with each of the major parties, the label “Democrat” or “Republican” does not necessarily accurately convey whether the candidate is pro-choice or pro-life, pro-gun control or pro-gun rights, and so on.<sup>43</sup> Some cues apparently used by voters—a candidate’s looks, eloquence, height, or the place of the candidate’s name on the ballot, for example—are particularly vulnerable in this respect.<sup>44</sup> Furthermore, voters who have already formed an impression of a candidate—including an inaccurate one—may be relatively immune to the influence of such cues.<sup>45</sup> Finally, savvy politicians, campaign managers, and political consultants are aware of these cues and thus may be able to manipulate their use to their advantage.<sup>46</sup>

Despite these doubts, there is significant evidence that certain heuristic cues do help voters to act as if they were well-, or at least better-, informed—i.e., to vote as they would if they had and understood more of the relevant information, particularly with respect to candidate voting, than the voters actually have.<sup>47</sup> Of course, such evidence does not demonstrate that voters are in fact well-informed—whether through heuristic cues or otherwise. This evidence

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(discussing the limits of political party affiliation as a helpful cue); *id.* at 424-26 (same with respect to opinion leaders).

43. See, e.g., James M. Snyder, Jr. & Michael M. Ting, *An Informational Rationale for Political Parties*, 46 AM. J. POL. SCI. 90 (2002) (modeling how party platforms may converge or diverge depending on various factors); Somin, *supra* note 24, at 422 (noting that “where party discipline is relatively lax, as it is in the United States, the positions of the party as a whole may be a poor predictor of the [positions] of key individual candidates for office”).

44. See, e.g., Garrett, *supra* note 18, at 678 n.38 (citing sources relating to ballot order).

45. See, e.g., James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 793 (2000) (finding that people who are misinformed on a specific issue tend to resist correct information, although the strength of that resistance is unclear); see generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 646-54 (1999) (summarizing how existing views of a candidate can lead to disregarding or misinterpreting new information).

46. See, e.g., Shanto Iyengar et al., *The Stealth Campaign: Experimental Studies of Slate Mail in California*, 17 J.L. & POL. 295, 300-02 (2001) (describing the use of carefully designed and targeted “slate mailers” to influence voters); Somin, *supra* note 26, at 1322 (noting that ill-informed voters are probably the most vulnerable to such manipulation).

47. See, e.g., Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 217 (1996) (concluding that in the context of presidential elections, voters are more likely to vote in a manner consistent with their personal preferences apparently through the use of heuristic cues, although they do not fully match how they would vote if they had complete information); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63-64 (1994) (concluding that in the limited context of certain ballot initiatives, knowing whether a particular industry supported or opposed the initiative provided a useful heuristic cue). But see Burnett et al., *supra* note 24, at 4 (concluding that in the direct democracy context, uninformed and informed voters tend to have equal success in applying their preferences).

demonstrates just that heuristic cues help the voters act more *as if* they are well-, or at least better-, informed. It would be more desirable if voters were actually well-informed, particularly since being well-informed would presumably have broader positive effects. Heuristic cues that are not misleading, however, are at least an improvement for the relatively uninformed.

There are several reasons, however, to be skeptical of the proposition that contributor information, at least in its current form, is a helpful heuristic cue. First, it is not clear what cues such information provides that is not already provided by other existing and readily accessible heuristic cues such as party affiliation and endorsements.<sup>48</sup> These cues, like contributor information, also arguably have value because of what voters know about the third parties involved.<sup>49</sup> Studies that have shown the greatest positive effect from contributor or other supporter information has been in the context of ballot initiatives, where party affiliation and other candidate-related heuristic cues are often lacking. Here, contributor information may be one of the few, if not the only, heuristic cues available to voters.<sup>50</sup>

Second, it appears that the vast majority of contributors will not be known to the vast majority of voters, and so the fact of their financial support will not provide *any* useful information about a candidate to most voters.<sup>51</sup> That is, while a voter might be able to use the fact that, for example, Jane Fonda or Rush Limbaugh contributed to a particular candidate's campaign or to an organization that opposed a particular candidate to intuit correctly something about the relevant candidate's qualifications for office or policy positions, the vast majority

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48. See generally Cheryl Boudreau, *Are Two Cues Better Than One? An Analysis of When Multiple Cues Improve Decisions* (Mar. 25, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1368562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368562) (noting that little research has been done on the effect of multiple cues and concluding—based on controlled experiments focusing on cues relating to the trustworthiness of a knowledgeable speaker—that in this context, two cues may increase the likelihood of a correct decision).

49. This assumes, of course, that they know something about such third parties, but the same limitation applies to contributor information. See SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 62 (1998) (noting that endorsements are only a useful cue if a voter is able to recognize the cue); Somin, *supra* note 26, at 1320-21 (noting that many heuristic cues require a foundation of basic knowledge to be useful).

50. See, e.g., BOWLER & DONOVAN, *supra* note 49, at 168-70; Garrett & Smith, *supra* note 29, at 297; Kang, *supra* note 20, at 1151-53.

51. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995) (noting that “in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message”); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (citing a survey that found even in the ballot measure context that it is endorsements by relatively well-known individuals and groups, such as interest groups, politicians, and celebrities, that voters find helpful); McGeveran, *supra* note 18, at 26-27 (finding that even if a voter correctly identifies a well-known person’s or group’s views, that voter cannot tell why that person or group donated to the campaign).

of reported contributors are not household names within their local communities, much less for most of the relevant electorate.<sup>52</sup> After all, even candidates for positions such as state representative in a relatively small state usually have dozens, if not hundreds, of contributors above the reporting thresholds, most of whom are relatively unknown to the public. Some commentators have argued that the large volume of contributor information may have a *negative* effect on informing voters.<sup>53</sup>

Third and finally, it is not clear that most voters even know contributor information before they enter the voting booth.<sup>54</sup> While party affiliation is usually listed on the ballot, and interest group, newspaper, and celebrity endorsements are often circulated widely, voters generally gain access to contributor information only by proactively searching for such information, which few voters probably do even with Internet-accessible databases.<sup>55</sup> There are a number of private groups that take the available contributor information and attempt to render it more accessible to voters by, for example, providing maps that show the locations of contributors<sup>56</sup> or reporting only contributor information for supporters of particular types of candidates.<sup>57</sup> There is little evidence, however, that such attempts have been particularly successful in educating voters, especially before election day. Even intermediaries such as the media, which might be viewed as in the business of educating voters before election day,

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52. See Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 117, 143 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (noting that for individuals with relatively low political knowledge, “party identification and well-known political figures” serve as useful cues).

53. See, e.g., Bauer, *supra* note 14, at 52; Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1045-47 (2003) (noting the potential for harmful “information cascades” but arguing that disclosure of group support for candidates is unlikely to lead to such harmful effects). This potential for negative effects may be increased by the fact that disclosures generally also require disclosure of information relating to expenditures as well as contributions.

54. See MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 46-48 (1998) (noting the difficulties faced in ensuring that usable contributor information reaches voters, particularly before Election Day).

55. See ACKERMAN & AYRES, *supra* note 18, at 27 (“[I]f most voters pay scant attention to politics, they won’t take the time to go through the lengthy lists of donors published in the name of ‘full information.’”); see generally RICHARD DAVIS, THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM 23 (1999) (noting that most citizens, on most political issues, will not take the time to seek out information regardless of how inexpensive or convenient it may be to do so).

56. See, e.g., *Campaign Donors: Fundrace 2008*, HUFFINGTON POST, <http://fundrace.huffingtonpost.com> (last visited Aug. 10, 2010) (allowing the identification of federal election contributors by geographic location).

57. See, e.g., PROP 8 MAPS, <http://www.eightmaps.com> (last visited Aug. 10, 2010) (providing maps showing the locations of supporters of California’s Proposition 8, which changed California’s constitution to prohibit same-sex marriage).

have a variety of incentives—the need to attract readership and to demonstrate autonomy and objectivity, for example—that shape and limit their use of political contributor data.<sup>58</sup> There are also significant reasons to believe that the most effective location for providing useful information is on the ballot itself, which never includes contributor information.<sup>59</sup>

Indeed, at least some of the efforts by institutions that have the capacity to review and reformat contributor data appear to be designed primarily to inform neighbors, customers, co-workers, employers, and others with relationships to the contributors about the character or positions of the contributors, not to inform voters about the character or positions of the candidates. For example, Fundrace 2008, a database of federal election-related contributors maintained by the Huffington Post website, is in prominent part designed to help locate contributors on a map and to ease learning about which candidates or political groups one's neighbors support.<sup>60</sup> Similarly, MSNBC sifted through federal contributor data to identify journalists who had made federal political contributions, often in apparent violation of their employers' stated policies.<sup>61</sup> While it is possible that such use of this information may have other positive effects—such as reinforcing journalistic neutrality in the case of the MSNBC example—it does not further the voter-informing interest relied upon by the Supreme Court in *Citizens United*.<sup>62</sup>

There are, however, intermediary institutions that process the raw contributor data and highlight aspects of the data that relate to the candidates, as opposed to the contributors. For example, the media often publicly identifies controversial or high-profile contributors, which in turn may lead to candidates and political groups eschewing contributors from such sources. Similarly, the media and other groups may identify certain candidates or political groups as being heavily supported by employees of a particular industry or from a particular geographic region.<sup>63</sup> Candidates and political parties, as well as the government agencies

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58. See Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 238-39 (2007) (discussing such concerns with respect to newspaper use of campaign finance data).

59. E.g., Burnett et al., *supra* note 24, at 38-42.

60. See *Campaign Donors: Fundrace 2008*, *supra* note 56.

61. See Bill Dedman, *The List: Journalists Who Wrote Political Checks*, MSNBC.COM, <http://www.msnbc.msn.com/id/19113455/ns/politics> (last updated July 15, 2007).

62. See generally Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1044-47 (2003) (discussing the possible value of “gossip” to society, or the lack thereof).

63. See, e.g., Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (quoting a journalist crediting campaign finance disclosure laws with allowing her to inform readers that support for a particular ballot measure did not come primarily from small businesses, as had been publicly represented by its supporters, but instead from “giant tobacco [c]ompanies”); ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1224 n.11 (E.D. Cal. 2009) (concluding that it is “very probable” that the California electorate would be interested in knowing the extent to which financial support for a ballot initiative comes from outside the state); see also Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a*

that receive the initial reports, may also review this information so as to highlight information of particular salience to voters before the relevant election.<sup>64</sup> Of course, if the receiving government agencies served in this filtering role instead, they could disclose certain patterns of information (e.g., industry or geographic distribution) *without* disclosing individual identification data. Choosing what patterns should be disclosed might not be a simple task; therefore, private parties should experiment with what the public finds useful to know.<sup>65</sup>

What is less clear is the extent and effect of these filtering efforts. Especially in an age of shrinking media budgets, there is reason to believe that such filtering by intermediaries is relatively limited.<sup>66</sup> Even if intermediaries serve in this role, at least three possible effects could be imagined. First, and most positively, the filtered information may be significantly more likely to reach and be used by voters than the unfiltered, individual contributor information.<sup>67</sup> There is, however, some skepticism that this is the case.<sup>68</sup> For example, research indicates that newspapers provide very limited coverage of campaign finance issues, especially absent a significant scandal involving contributions.<sup>69</sup>

Second, candidates and political groups may avoid certain contributors or certain concentrations of contributors because they perceive a potential for an adverse inference from voters, whether in fact such an adverse inference is likely to occur.<sup>70</sup> For example, voters likely view candidates and ballot initiatives that receive support from certain disfavored industries, such as tobacco companies, less favorably. Again, the existence, much less the strength, of such an effect is unknown.

Third, and less positively, the intermediary organizations may selectively publish or emphasize certain contributor information to further their particular

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*Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 36 (2010) (raising concerns that out-of-state contributions to voter referendum campaigns may undermine a state's independence from other states, a risk that could only be known if the states where such contributions originate are known).

64. See Garrett, *supra* note 53, at 1022 (noting that many voters rely on intermediaries to bring information to their attention).

65. See, e.g., *Investigate Money in State Politics*, FOLLOW THE MONEY, <http://www.followthemoney.org> (last visited Aug. 10, 2010) (providing a variety of filters for federal and state political campaign contributors). But see McGeveran, *supra* note 18, at 27-28 (questioning whether either government or private actors have the capacity to engage in meaningful filtering).

66. See, e.g., MALBIN & GAIS, *supra* note 54, at 46-47.

67. See Wilcox, *supra* note 15, at 377.

68. See, e.g., MALBIN & GAIS, *supra* note 54, at 48.

69. See La Raja, *supra* note 58, at 246-47.

70. See ACKERMAN & AYRES, *supra* note 18, at 27, 27 nn.2-3 (noting that candidates will consider the potential costs of accepting money from notorious groups, although expressing skepticism that such costs will be considered high enough to refuse significant contributions in most cases); La Raja, *supra* note 58, at 248 (arguing that a lack of increased scandal stories when better disclosure regimes are in place may indicate that politicians are more careful about who they accept contributions from when there is greater public disclosure of contributors).

agendas or narratives, thereby actually distorting the information reaching voters and encouraging intuitive leaps to false conclusions about candidates.<sup>71</sup> Even intermediaries that are relatively unbiased, such as journalists, may be subject to such distortions if they rely on others to filter this information for them.<sup>72</sup>

There are data indicating, however, that the less prominent second aspect of most disclosure regimes may actually be more effective when it comes to informing voters. Required disclaimers on political communications are similar to interest group endorsements in that they demonstrate the financial commitment of groups or relatively wealthy individuals. Unlike the vast majority of contributors, such well-financed organizations (or wealthy individuals) are more likely to be known to voters, at least if they commonly take public positions on candidates as well as policy issues.<sup>73</sup> The fact that the disclaimer represents a usually substantial financial commitment reduces the chance that this cue could be manipulated.<sup>74</sup> Perhaps most importantly, because the disclaimer information is communicated directly to voters when they receive the organization or individual's message, there is evidence that it does help voters evaluate both the message received and the identified candidate.<sup>75</sup> As a constitutional matter, however, current law would prohibit disclaimer requirements for certain communications such as personally written leaflets distributed by an individual, as was the case in *McIntyre v. Ohio Elections Commission*.<sup>76</sup>

The existing mass media disclaimer regimes are not without their flaws. While some organizations that pay for political communications are well-known to voters, others are "front" organizations given innocuous-sounding or otherwise

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71. See, e.g., Bauer, *supra* note 14, at 39 n.4, 45-46 (arguing that some intermediaries use disclosed information to advance their own agendas, including to generate support for more expansive campaign finance regulation).

72. See La Raja, *supra* note 58, at 248 (identifying this concern).

73. See Garrett, *supra* note 18, at 680-81 (using well-known groups such as the NRA and the Sierra Club as examples of contributors who provide useful heuristic cues).

74. See Boudreau, *supra* note 20, at 288 (concluding that information is generally more helpful and reliable if the speaker shares a common interest with the decisionmaker, faces a penalty for lying, or is verified by a third party).

75. See, e.g., Kang, *supra* note 20, at 1180 n.151; see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354 n.18 (1995) (quoting *Bellotti* with approval but distinguishing the individually written and funded leaflet in that case); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (stating that in the ballot initiative context, "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS, *supra* note 52, at 147, 157 (suggesting that contributor information may enhance voter competence if it were made more accessible to voters by, for example, "requiring candidates or election officials to purchase access to the print or broadcast media and disseminate the names of large contributors").

76. 514 U.S. 334 (1995).

misleading names that hide the true motivations and views of those who created and fund them.<sup>77</sup> Perhaps the most famous example of such a group was the creation of “Republicans for Clean Air” by a small group of George W. Bush supporters to oppose Senator McCain in the 2000 Republican primary elections.<sup>78</sup> Individuals can also pay for such communications, and even wealthy individuals who solely fund such communications may not be known to most voters. Thus, disclosure of the names of wealthy individuals by themselves may not provide a useful cue.

The bottom line is that the Supreme Court’s simple assertion that the existing disclosure and disclaimer regime “enables the electorate to make informed decisions and give proper weight to different speakers and messages”<sup>79</sup> is deeply flawed. As noted previously, while existing research indicates that such information *may* help inform voters, whether it has a reasonable chance of doing so depends both on *what specific information* is disclosed and *how* that information is disseminated. More research is needed, but it appears that the most likely way to help voters make decisions as if they were fully informed is to limit disclosures to contributors who are likely to be known to voters and to expand disclosures through disclaimers in the political communications that the largest—and likely most well-known—contributors support. Databases of numerous \$200 contributors (or less, in the case of most states) may serve other purposes—for example, enhancing enforcement of contribution limits or identifying contributors who are barred from making contributions such as foreign citizens, journalists, and charitable organizations. Yet there is little, if any, evidence that this information even reaches voters before election day, much less is useful to the voters when they decide how to vote.<sup>80</sup> Maintaining and ensuring the accuracy of such databases may also draw limited enforcement resources away from other aspects of campaign finance laws.<sup>81</sup>

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77. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 128, 197 (2003) (providing examples of such organizations); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (listing quotes from both a political science professor and a public relations firm executive regarding the common use of such organizations); Mike McIntire, *Hidden Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 24, 2010, at A1, available at <http://www.nytimes.com/2010/09/24/us/politics/24donate.html>; see also Garrett & Smith, *supra* note 29, at 296 (discussing the use of “veiled political actors” in the ballot initiative context).

78. See Mark Sherman & Jena Heath, *Bush Denies Ad Attacking McCain on Environment*, ATLANTA J.-CONST., Mar. 4, 2000, at A4; Richard W. Stevenson & Richard Perez-Pena, *Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. TIMES, Mar. 4, 2000, at A1.

79. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

80. Higher thresholds for disclosure requirements also are less vulnerable to constitutional challenge. See Hasen, *supra* note 5, at 280; McGeveran, *supra* note 18, at 42.

81. See Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1913-15 (1999) (concluding, based on a study of early 1990s FEC enforcement actions, that the vast majority of claims of disclosure violations considered by the FEC are brought by third parties, and many such claims are trivial). But see Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance*

Of course, if there were only a potential upside to such disclosures and no downside, then keeping and expanding the existing disclosure and disclaimer regime, however imperfect, could be justified both constitutionally and as a policy matter. There is a commonly asserted downside, however—the risk of retaliation against those identified through required disclosures, and the related fear of retaliation that may chill political contributions by others. It is to this other narrative that we now turn.

## II. RISK: RETALIATION

There are several potential harms cited by critics of the current disclosure and disclaimer rules, including privacy costs and administrative burdens on the organizations that must provide the required information as well as actual or potential retaliation and the related chilling effect on potential contributors. The focus of this Part is on the retaliation-related harms for three reasons. First, the retaliation-related harms are included in the privacy costs and represent the most verifiable part of those costs.<sup>82</sup> Second, while increased computer capacity may enhance the potential for retaliation, as detailed below, at the same time, it is significantly reducing the administrative costs of disclosure given the ease of maintaining databases and electronically filing required reports. Whether such administrative burdens are constitutionally significant is also unclear.<sup>83</sup> Third, it was the costs of retaliation that Justice Thomas relied on in his opinion objecting to the conclusion of the other eight Justices that the disclosure and disclaimer provisions at issue in *Citizens United* were constitutional.<sup>84</sup>

The retaliation narrative, like the informing-voters narrative, is deceptively simple. Public disclosure of the contributors to candidates, political groups, and groups that engage in certain types of political communications exposes those

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*Violations*, 52 ADMIN. L. REV. 629, 648-50 (2000) (concluding that the California Fair Political Practices Commission appears to be more efficient in enforcing its disclosure-only state campaign finance laws than the FEC is with respect to enforcing the broader federal campaign finance laws).

82. See, e.g., McGeeveran, *supra* note 18, at 16-20 (discussing the privacy costs of political contribution disclosure—including, but not limited to, the risk of retaliation); Wilcox, *supra* note 15, at 375.

83. Compare *Citizens United*, 130 S. Ct. at 897-98 (finding the disclosure, recordkeeping, and similar administrative requirements related to forming and maintaining a political committee or PAC to be unconstitutionally burdensome, without mentioning the limits on contribution sources and amounts applicable to PACs), with *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252-56 (1986) (Brennan, J., plurality op.) (finding the PAC alternative unconstitutionally burdensome because of the administrative burdens on PACs, including limits on whom can be solicited for contributions); *id.* at 265-66 (O'Connor, J., concurring in part and concurring in judgment) (concluding that the PAC alternative was unconstitutionally burdensome only because it both requires “a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups” with few or no “members”).

84. *Citizens United*, 130 S. Ct. at 980-82 (Thomas, J., concurring in part and dissenting in part).

contributors to a significant risk of retaliatory actions by those who disagree with the supported candidates or groups.<sup>85</sup> Such retaliation harms the contributors for exercising their constitutional right to make such contributions and may chill the exercise of that right by others sufficiently to raise constitutional concerns.<sup>86</sup> An important coda to this narrative is that the existing legal avenue of obtaining an exemption from the disclosure requirements on a case-by-case basis is insufficient to address this risk.<sup>87</sup>

The strength of this narrative depends on the extent to which such retaliation in fact occurs or is perceived to occur. As those who argued in favor of this narrative in *Citizens United* undoubtedly discovered, there is very little research on this point. It is likely for this reason that neither they, nor those who sought to discount or minimize this risk, could point to more than anecdotal evidence of retaliation against contributors to political causes. It is with that anecdotal evidence that we start.

The available anecdotal information generally falls into five categories. First, government agencies in various states during the civil rights era attempted to obtain the member and donor rolls of local NAACP chapters in order to expose such members and donors to intimidation. These efforts eventually led to Supreme Court decisions barring such attempts and, as a result, limiting the ability of governments to require such disclosure absent a sufficiently important governmental interest.<sup>88</sup> Second, there are the documented instances of retaliation against publicly disclosed contributors to political parties self-identified as “communist” or “socialist.” In these situations, the courts, and on occasion, the relevant government agencies, have granted exemptions on a case-by-case basis to the generally applicable campaign finance disclosure requirements. However, this was done only after the parties at issue provided evidence that there was a reasonable probability of retaliation against their financial supporters if their identities became publicly known.<sup>89</sup> Third, there are the flurry of stories about retaliation against publicly disclosed supporters following the passage of California’s Proposition 8.<sup>90</sup> Fourth, there are stories

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85. See, e.g., McGeveran, *supra* note 18, at 16-20.

86. See *Buckley v. Valeo*, 424 U.S. 1, 71 (1976); *DeGregory v. Att'y Gen.*, 383 U.S. 825, 829 (1966); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958).

87. See *Buckley*, 424 U.S. at 74 (stating that such an exemption is constitutionally required when there is a reasonable probability that disclosure will lead to threats, harassment, or reprisals).

88. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Buckley*, 424 U.S. at 15; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Gibson v. Fla. Legis. Investig. Comm.*, 372 U.S. 539, 546 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960); *NAACP*, 357 U.S. at 464-66.

89. E.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 102 (1982); *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 423 (2d Cir. 1982) (involving a group that supported communist candidates); *McArthur v. Smith*, 716 F. Supp. 592, 593-94 (S.D. Fla. 1989) (involving a Socialist Workers Party candidate and his supporters); *Socialist Workers Party, FEC Adv. Op. 2009-01*, at 1, 10-11 (Mar. 20, 2009) (renewing the partial exemption from the federal disclosure rules for several socialist political parties and their candidates).

90. See Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47

about retaliation, or fear of retaliation, by elected officials against those that supported their opponents.<sup>91</sup> The most infamous of these instances was the “K Street Project,” where Republican members of Congress threatened lobbying organizations with a loss of access to Republican lawmakers if they did not hire Republicans for their lobbying positions.<sup>92</sup> Additionally, there are other stories about such retaliation or apparent fear of such retaliation.<sup>93</sup> Finally, there has been at least one instance where disclosures led not to retaliation based on the candidate, group, or ballot initiative at issue, but based on other information disclosed about a contributor, such as the contributor’s employer.<sup>94</sup>

The veracity of the retaliation stories is generally not at issue. The history of the civil rights movement is well known; the communist and socialist political parties have had to produce sufficient evidence of retaliation to qualify for exemption; the Proposition 8 retaliation stories were relatively widespread; the K Street Project undoubtedly existed; and even the apparently rare case of retaliation unrelated to the candidate or group at issue has been documented. The questions raised include: What is the extent of actual retaliation and perception of retaliation? and What is the extent to which the possibility of retaliation leads potential contributors not to contribute, or to contribute less (i.e., below the reporting thresholds)?

With respect to the first question, there is surprisingly little information. Given the public availability of contributor information, it would appear to be a relatively simple task to survey a statistical valid sample of contributors to determine if they have experienced any form of retaliation as a result of the disclosure of their financial support. Yet for whatever reason, no one appears to have done such a survey, much less a series of surveys, focusing on contributors to different types of groups (e.g., candidates, political parties, other political

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HARV. J. ON LEGIS. 75, 98-99 (2010) (gathering accounts of such retaliation); Thomas Messner, *The Price of Prop 8*, HERITAGE FOUND. (Oct. 22, 2009), <http://www.heritage.org/Research/Reports/2009/10/The-Price-of-Prop-8> (same).

91. See, e.g., JACKSON, *supra* note 18, at 69-70, 77-81 (detailing how officials in both major parties pressured donors to change their giving patterns on threat of losing access to policymakers).

92. See Nicholas Confessore, *Welcome to the Machine: How the GOP Disciplined K Street and Made Bush Supreme*, WASH. MONTHLY 29, 30 (Aug. 2003); Peter Perl, *Absolute Truth*, WASH. POST, May 13, 2001, at W12; Jim VandeHei, *GOP Monitoring Lobbyists’ Politics: White House, Hill Access May Be Affected*, WASH. POST, June 10, 2002, at A1.

93. See, e.g., Mary Ann Akers, *Kerry Puts GOP Donor on Defensive*, WASH. POST, Feb. 28, 2007, at A17 (reporting that Senator John Kerry questioned ambassadorial nominee Sam Fox regarding his donations to Swift Board Veterans for Truth); Kimberly A. Strassel, *Challenging Spitzerism at the Polls*, WALL ST. J., Aug. 1, 2008, at A11 (reporting that a candidate challenging an incumbent state attorney general stated that many potential contributors did not donate for fear of retaliation by the incumbent if their names appeared in the challenger’s records).

94. See Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3 (recounting how the author’s donations to two presidential campaigns led to her being publicly targeted by a radical and violent animal rights group because it learned, through public campaign contribution information, that she worked for Bristol-Myers Squibb).

groups, or ballot initiative committees relating to various topics).

Even generalizing the anecdotal information beyond the specific contexts in which undoubted retaliation occurred is problematic without further information. The civil rights movement was arguably a unique event in our nation's history for which there is no current parallel with respect to the heated emotions and entrenched opposition that arose. Retaliation against supporters of communist or socialist parties does not necessarily indicate that supporters of other parties, even other third parties such as the Libertarians or the Greens, are at risk. This was the conclusion that the Supreme Court reached in *Buckley v. Valeo* when it held that the First Amendment did not require a blanket exemption for minor parties from the requirement that they publicly disclose their financial supporters.<sup>95</sup> The circumstances that led to the retaliation against Proposition 8 supporters—including the strong lesbian-gay-bisexual-transgender (LGBT) community in California and the perhaps surprising passage of Proposition 8—may not even apply to same-sex marriage ballot initiatives in other states, much less to candidate elections.<sup>96</sup> Also, the use of disclosed information for unrelated retaliation purposes appears to be very rare, with apparently only one situation identified recently.<sup>97</sup>

Perhaps the most troubling set of retaliation anecdotes are those relating to the K Street Project and stories about less well-organized state and local equivalents. The reason for this is if anyone actually pours through campaign contribution databases, it is probably elected officials and their staffs. Such stories are essentially the reverse of rent-seeking by elected officials, where an official threatens lobbyists and interest groups with action, or inaction, that will hurt a particular group's interests unless the lobbyist or interest group provides a certain level of financial support to the official's re-election campaign.<sup>98</sup> The K Street Project and similar stories suggest that elected officials may also use the threat of negative action or inaction to reduce employment of, or contributions by, lobbyists and others to individuals and groups who are likely to challenge these officials.<sup>99</sup> That said, such stories tend to be limited to lobbyists and others

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95. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

96. See, e.g., Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009) (stating “nor is there a record here indicating a pattern of threats or specific manifestations of public hostility towards [the plaintiffs] or showing that individuals or organizations holding similar views have been threatened or harmed” in litigation by anti-same sex marriage groups challenging Maine’s campaign finance disclosure laws). But see Eliza Newlin Carney, *New Spending Rules Mean New Backlash*, NAT'L J., Aug. 30, 2010 (reporting retaliation against Target Corp. and Best Buy Co. for contributions to a Minnesota political group backing an anti-gay gubernatorial candidate), [http://www.nationaljournal.com/njonline/po\\_20100830\\_3944.php](http://www.nationaljournal.com/njonline/po_20100830_3944.php).

97. See Brienza, *supra* note 94.

98. See, e.g., Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 124-25.

99. See Garrett & Smith, *supra* note 29, at 303 (noting that disclosure of groups and individuals that support ballot initiatives may attract retaliation by government officials in particular because these initiatives are often an attempt to bypass such officials).

involved directly in seeking to influence public policy—groups serving an important role in our political process but representing only a small subset of the general public. The longevity of such efforts also appears to be limited due to the shifting winds of political fortune.

It is also sometimes difficult to sort out retaliation against supporters whose political views were known for reasons other than the public disclosure of their financial contributions. For example, many of the Proposition 8 retaliation stories involved supporters who advertised their support through signs and bumper stickers.<sup>100</sup> While such stories provide evidence of the potential for retaliation against supporters whose support is publicly known only because of the contributor disclosure system, they do not conclusively demonstrate that there is a reasonable probability that such retaliation will occur.

Finally, the degree of harm caused by the retaliation is uncertain and may be relatively low. Setting aside the arguably unique situation of the civil rights movement and the limited situation of communist and socialist political parties, there had been a number of alleged incidences of individuals losing their livelihood or being physically threatened. Much of the alleged retaliation, however, appears to result in nothing more than social stigma or embarrassment.<sup>101</sup> The federal district court hearing a challenge to California's disclosure laws by Proposition 8 supporters refused to preliminarily enjoin those laws in part because it found that “[p]laintiffs' claim would have little chance of success in light of the relatively minimal occurrences of threats, harassment, and reprisals.”<sup>102</sup> It should be noted, however, that after the court issued its opinion, the plaintiffs submitted forty-nine declarations of individuals (in addition to the nine originally submitted along with press reports of retaliation) alleging various

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100. See Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment, Appendices A & B, ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (No. 2:09-CV-00058-MCE-DAD) [hereinafter Plaintiffs' Statement of Undisputed Facts] (providing summaries of statements by fifty-eight “John Does” regarding retaliation for their support of Proposition 8, which included displaying yard signs and bumper stickers, making other public pronouncements, and contributing financially, of which at most ten appear to have had their support revealed solely by the required public disclosure of their financial contributions).

101. See, e.g., *id.* (providing summaries of statements by fifty-eight “John Does” regarding retaliation for their support of Proposition 8, most of whom experienced relatively minor negative consequences); Declaration of Sarah E. Troupis in Support of Plaintiffs' Motion for Preliminary Injunction at 2-4, ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (No. 2:09-CV-00058-MCE-DAD) [hereinafter Troupis Declaration] (listing news stories reporting retaliation against Proposition 8 supporters, including death threats, physical violence, threats of physical violence, vandalism, and job losses, but also less serious forms of retaliation such as peaceful protests and negative comments); Brienza, *supra* note 94 (explaining how disclosure led to being listed as a “target” by a radical animal rights group, but no more specific threats or actions resulted); see also *supra* notes 89-91 and accompanying text (relating to government official retaliation).

102. See ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009); see also Plaintiffs' Statement of Undisputed Facts, *supra* note 100.

forms of retaliation.<sup>103</sup> A related issue is the fact that many of the retaliatory actions are in the form of legal forms of political protests—boycotts, pickets, angry emails and telephone calls, and so on—that are themselves constitutionally protected and even celebrated as demonstrating political engagement and a healthy democracy, arguably providing an offsetting benefit.<sup>104</sup> In the recent *Doe v. Reed* oral argument relating to disclosure of ballot initiative petition signers, Justice Scalia went so far as to say, “[T]he fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate, or to take part in the legislative process.”<sup>105</sup>

There is, however, at least one significant factor that suggests that retaliation, including criminal forms of retaliation, may be an increasing risk outside of the contexts and forms in which it has previously occurred. That factor is the growing availability of contributor information over the Internet.<sup>106</sup> For example, retaliation against Proposition 8 supporters may have largely been fueled by the creation of websites dedicated to identifying those supporters. The most well-known such site is [www.eightmaps.com](http://www.eightmaps.com), which uses a combination of the state government’s contributor database and Google Maps to create an easily searchable system for locating and identifying Proposition 8 supporters.<sup>107</sup> While that website does not overtly encourage any particular use of this information or characterize the persons identified in any particular way, another website called “Californians Against Hate” lists particular Proposition 8 supporters in its “Dishonor Roll,” including all donors who gave \$5000 or more.<sup>108</sup> Such sites also may encourage individual, as opposed to organized, retaliation attempts that are more likely to veer into particularly harmful or illegal areas.

Websites of this nature are not necessarily limited to Proposition 8 supporters. Accountable America, an organization dedicated to opposing right-wing and special interest policies, has an ongoing “Conservative Group Project” to educate the public about right-wing donors.<sup>109</sup> Press reports state that this

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103. *ProtectMarriage.com*, 599 F. Supp. 2d at 1216-17; see also Plaintiffs’ Statement of Undisputed Facts, *supra* note 100.

104. See *ProtectMarriage.com*, 599 F. Supp. 2d at 1218 (noting that some of the actions complained of by plaintiffs are historic and lawful means of voicing dissent, including boycotts); Plaintiffs’ Statement of Undisputed Facts, *supra* note 100 (providing summaries of statements by fifty-eight “John Does” regarding retaliation for their support of Proposition 8, including picketing, boycotts, and angry emails, letters, and telephone calls); Troupis Declaration, *supra* note 101 (listing news stories reporting retaliation against Proposition 8 supporters, including reports of public protests, picketing, and boycotts).

105. Transcript of Oral Argument at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

106. See, e.g., McGeveran, *supra* note 18, at 10-13 (describing the use of the Internet to increase the dissemination of political contributor data).

107. See PROP 8 MAPS, *supra* note 57.

108. See *The Californians Against Hate Dishonor Roll*, CALIFORNIANS AGAINST HATE, <http://www.californiansagainsthate.com/dishonor-roll> (last visited Aug. 10, 2010).

109. See ACCOUNTABLE AMERICA, <http://www.accountableamerica.com/about> (last visited

organization has also sent letters to such donors, threatening to publicize their financial support of right-wing causes and implying that doing so will lead to boycotts and similar adverse reactions (although conservative activists quoted in those stories appeared unconcerned).<sup>110</sup> While the organization has not made a public database of such contributors available, at least so far, it would not be difficult for it to do so using existing, publicly available contributor information.

The ease of creating such a database is evidenced not only by the Proposition 8 databases, but also by other private party established Internet databases of political contributors, such as the previously mentioned Fundrace 2008<sup>111</sup> and the newly established TransparencyData.com that combines federal and state campaign contribution information.<sup>112</sup> Other examples of such websites include the previously mentioned MSNBC website that discloses journalists who made federal political contributions and another website that collects data from state databases of political contributions.<sup>113</sup> Data like this could also potentially find its way to websites with broader foci, such as the “Unvarnished” website for posting anonymous reviews of professional reputations.<sup>114</sup> The growth of social networking sites also makes it easy to quickly communicate the positions of individuals to their friends, family, and co-workers. While recent events had led to a focus on retaliation against supporters of anti-same-sex marriage initiatives, the Internet has been used to encourage harassment outside of the political contribution context.<sup>115</sup> What remains unexplored, however, is the extent to which the growth of access to information through the Internet will in fact lead to greater incidences of retaliation.

Research on the second question—whether the fear of retaliation changes the behavior of potential contributors—is almost nonexistent.<sup>116</sup> One survey prepared by Dr. Dick M. Carpenter II for the Institute for Justice found that a significant percentage of respondents would “think twice before donating money” if their name and other information, such as their address or employer, were released to the public as a result.<sup>117</sup> The survey does not reveal, however,

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Aug. 10, 2010).

110. Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, at A15.

111. *Campaign Donors: Fundrace 2008*, *supra* note 56.

112. TRANSPARENCY DATA, <http://www.transparencydata.com> (last visited Aug. 10, 2010).

113. See Dedman, *supra* note 61; *Investigate Money in State Politics*, *supra* note 65.

114. *About Unvarnished*, UNVARNISHED, [http://www.getunvarnished.com/page/about\\_unvarnished](http://www.getunvarnished.com/page/about_unvarnished) (last visited Aug. 10, 2010).

115. See, e.g., Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1062-63 (9th Cir. 2002) (en banc) (upholding an injunction against the distribution, including over the Internet, of materials and personal information relating to abortion providers with a specific intent to threaten).

116. See McGeeveran, *supra* note 18, at 21 (noting the lack of empirical evidence regarding whether the prospect of disclosure deters would-be contributors).

117. DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7-8 (Mar. 2007), *available at*

what portion of the respondents would affirmatively state that they would choose not to donate, or donate as much, given these disclosures; nor did that study test whether the respondents would change their giving patterns in the face of such disclosures (as opposed to saying that they might). The study also did not determine to what extent individuals knew about the existing disclosure rules and made contributions despite that knowledge. Similarly, summaries of sworn statements by Proposition 8 supporters who faced retaliation, provided in the context of litigation challenging California's contributor disclosure rules, often failed to mention whether the supporters would curtail future financial support for similar measures. If the summaries did address this issue, they mostly said the supporters would be "unlikely," "reluctant," "hesitant," or otherwise uncertain about providing such support without flatly ruling out doing so.<sup>118</sup>

One reason to take this possible "chilling" effect seriously, however, is the fact that people tend to be bad at estimating risk.<sup>119</sup> In particular, when presented with a small sample, people tend to view that sample as highly representative of the population from which it is drawn, and similarly, when an instance or occurrence can readily be brought to mind, it leads to overestimation of the frequency of that instance or occurrence.<sup>120</sup> For example, say that retaliation, even in the most heated situations, consists of "relatively minimal occurrences of threats, harassments, and reprisals," as a federal district court found with respect to Proposition 8 supporters.<sup>121</sup> If the sample of Proposition 8 supporters of which the public is aware consists mostly of supporters who faced retaliation, and the retaliation is memorable in that it threatened their livelihood or physical safety,<sup>122</sup> then the public *perception* may tend to be that many, if not most, Proposition 8 supporters faced retaliation and threats to their livelihood or physical safety. Such a perception, even though inaccurate, could lead to many potential contributors choosing to reduce or stop their contributions. The fact that even with disclosure, there are many (disclosed) contributors does not fully answer this concern<sup>123</sup> because such contributors represent a small portion of the

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[http://www.ij.org/images/pdf\\_folder/other\\_pubs/DisclosureCosts.pdf](http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf); see also Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567, 574-78 (2009) (discussing same survey).

118. See Plaintiffs' Statement of Undisputed Facts, *supra* note 100. See especially the summaries of declarations of John Doe numbers 1, 2, 8-9, 12-13, 19, 23, 27, 30, 43, 51, 53, who all mention a possible effect of the retaliation they experienced on their future financial support for similar causes. *Id.*

119. See McGeeveran, *supra* note 18, at 21-23 (discussing the possible chilling effect on expression).

120. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1125-27 (1974).

121. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009).

122. See Troupis Declaration, *supra* note 101, at 2-4 (listing news stories reporting retaliation against Proposition 8 supporters, including death threats, physical violence, threats of physical violence, vandalism, and job losses).

123. See Hasen, *supra* note 5, at 280-81 (arguing that the number of disclosed soft money

possible contributors. For example, the most successful political fundraising campaign in the United States—that of President Obama—received contributions from upwards of three million donors, but under one-sixth of those donors were at the relatively modest over \$200 disclosure threshold.<sup>124</sup> While that level of donor participation is impressive, those numbers alone—representing less than 1.5% of the 212 million individuals eligible to vote in the 2008 presidential election<sup>125</sup>—do not necessarily mean that there is no chilling effect caused by public disclosure of support for even a highly popular candidate. What the actual perception is with respect to the various potential types of contributions, much less the effect of that perception, is simply not known at this time. This potential chilling effect was sufficiently real, however, for the Supreme Court in *Buckley v. Valeo* to assert that “[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”<sup>126</sup>

It is true that a few jurisdictions have laws prohibiting the use of contributor data for retaliatory purposes.<sup>127</sup> More widespread promulgation of such laws might serve to limit both the actual and perceived risk of retaliation to contributors.<sup>128</sup> The track record of the existing laws is not encouraging in this respect, however, both because there appears to be little evidence of enforcement and because at least one state supreme court has struck down such a law as an unconstitutional restriction on free speech.<sup>129</sup> Similarly, the more common laws

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contributors to political parties demonstrates a lack of a chilling effect from disclosure).

124. See ANTHONY J. CORRADO ET AL., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 13-14 (2010), available at [http://www.cfinst.org/books\\_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf](http://www.cfinst.org/books_reports/Reform-in-an-Age-of-Networked-Campaigns.pdf) (observing President Obama’s fundraising campaign, in which only 405,000 of over three million donors donated above an aggregate amount of \$200).

125. See Michael McDonald, 2008 General Election Turnout Rates, U.S. ELECTIONS PROJECT, [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html) (last updated Oct. 6, 2010).

126. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976); see also *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir.) (concluding that if individuals would alter their communications and reconsider their political involvement if subject to disclosure, it would be sufficient to make a *prima facie* showing of chilling), *cert. dismissed*, 130 S. Ct. 2432 (2010).

127. See, e.g., WASH. REV. CODE § 42.17.010 (West, Westlaw through 2010 legislation) (providing that campaign finance and lobbying disclosure provisions “shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed”).

128. On the possible ability of such laws to reduce the perceived risk of retaliation even if they failed to reduce the actual incidence of retaliation, see generally Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006).

129. See *Fowler v. Neb. Accountability & Disclosure Comm’n*, 330 N.W.2d 136, 141 (Neb. 1983) (finding state laws that prohibited the use of campaign statements filed by political committees for “other political activity” and for “harassment” to be unconstitutional when addressing a case where the campaign statements included information about contributions made

that bar the use of contributor data for commercial use may effectively foreclose the mass use of such data by background-checking companies; however, both types of laws are unlikely to foreclose a potential employer or consumer from checking such data and do not extend to non-commercial and First Amendment protected political activity, such as boycotts and picketing.<sup>130</sup> Finally, while it is possible for individuals and groups to seek as-applied exceptions from the disclosure rules based on actual or likely harassment, it may be difficult to anticipate such retaliation. Additionally, the very act of applying for an exception may expose at least some individuals to retaliation.<sup>131</sup>

The strength of the retaliation narrative is therefore uncertain. There is no doubt that in some contexts private actors and, perhaps more troubling, government actors have used disclosed contributor information to engage in retaliatory actions against contributors—ranging from legal activities such as boycotts or employment termination to criminal activities, including destruction of property or threats of physical harm. There is no reliable information, however, on the extent of such retaliation, which demonstrates whether it extends beyond the contexts identified above and whether the increased access to contributor information through the Internet is—or will translate into—a significantly greater level of retaliatory acts. Similarly, although there are anecdotal data (and a single survey) indicating that the perceived risk of retaliation from disclosure *may* change potential contributor behavior, neither the extent of that perceived risk nor the strength of its effect on behavior is known.

### III. RECOMMENDATIONS

Both the extent to which disclosure of political contributor information aids voters in their ballot-box decisions and the extent to which such disclosure exposes contributors to retaliation and chills potential contributors are still in many ways open questions. The existing information does suggest possible changes to the current disclosure and disclaimer regimes that would increase the likelihood of aiding voters—in some instances, also minimizing the actual and perceived risk of retaliation. One change would be to reduce the scope of disclosure by significantly raising the disclosure thresholds or making public only certain non-identifying information for smaller contributors. Another change would be to expand the scope of disclaimers to facilitate delivery of information about major financial supporters to the voting public.

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by the committees to candidates).

130. See, e.g., 2 U.S.C. § 438(a)(4) (2006) (prohibiting the use of information from statements filed with the FEC “for the purpose of soliciting contributions or for commercial purposes”); ME. REV. STAT. tit. 21-A, § 1005 (West, Westlaw through 2009 legislation) (“Information concerning contributors contained in campaign finance reports . . . may not be used for any commercial purpose. . . .”); MINN. STAT. § 10A.35 (West, Westlaw through 2010 legislation) (“Information . . . from reports and statements filed with the [Minnesota Campaign Finance and Public Disclosure Board] may not be sold or used . . . for a commercial purposes. . . .”).

131. See Garrett, *supra* note 14, at 242.

The first change is based on the fact that the relatively low level of current dollar thresholds for disclosure of a contributor's identifying information does not appear to be justified by the government's interest in informing voters. The vast majority of such specific contributor information is unlikely to help voters because knowing the identities of those contributors does not provide any useful cues regarding the candidates supported, either directly or through communications by independent groups.<sup>132</sup> At the same time, disclosure of such information exposes these contributors to possible retaliation, even if perhaps relatively rare and usually not particularly harmful.<sup>133</sup> There may, of course, be other reasons for collecting such information, including aiding enforcement of contribution limits, identifying geographic or industry concentrations of contributors, and facilitating limited disclosure to particularly interested parties such as shareholders, members, or donors for the group involved and facilitating academic research.<sup>134</sup> The first reason only applies when such limits exist. However, in the post-*Citizens United* world, that is not the case for expenditures by independent groups, which are the subject of the most recent disclosure proposals. In fact, the most prominent of the proposed federal legislative responses to *Citizens United* would significantly expand the scope of the expenditures reached by disclosure requirements.<sup>135</sup> While prohibitions on certain types of contributors—e.g., non-resident, foreign citizens, and charitable organizations—still exist in this context, such prohibited contributors appear to be both relatively rare, and if they are giving less than even the increased threshold, they are unlikely to have a material effect on elections. As for collecting information about concentrations of contributors, both for voter information and academic research purposes, such purposes do not require public disclosure of the names and complete addresses of individual contributors.

At least in part for these reasons, several commentators have suggested only having public disclosure of aggregate data of voters for all but the largest contributors.<sup>136</sup> Organizations subject to the disclosure requirements could still report individual information to the government to permit government verification of the accuracy of reporting, but the publicly released information could be limited to aggregate data. One way to impose this limit would be to have the relevant government agency aggregate the data for donors below a

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132. See *supra* notes 48-72 and accompanying text.

133. See *supra* Part II.

134. See *supra* notes 14-15 and accompanying text.

135. See House DISCLOSE Act, *supra* note 6, § 202(a) (expanding the time period for electioneering communications); Senate DISCLOSE Act, *supra* note 6, § 202(a) (same); compare House DISCLOSE Act, *supra* note 6, § 201(a) (revising the definition of an independent expenditure) and Senate DISCLOSE Act, *supra* note 6, § 201(a) (same), with 2 U.S.C. § 431(17) (current definition of an independent expenditure).

136. See Briffault, *supra* note 18, at 655; McGeeveran, *supra* note 18, at 53-54; Noveck, *supra* note 90, at 107-10; Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327; David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 154-63 (2009).

certain threshold in various categories, such as by geographic locale or type of employer. If the relevant government agency lacked or was seen as lacking the willingness, resources, or ability to do such aggregation, another option would be to disclose only a portion of contributor data (e.g., city & state, zip code, occupation, and perhaps employer, but not name or street address) and leave it to private actors to then aggregate these data as they saw fit.

Implicit in this recommendation is at least the suggestion that contributing to a political effort is, for smaller contributions, more akin to voting as opposed to most forms of speech that necessarily involve identification of the speaker.<sup>137</sup> Voting is and has been for many years in the United States a private matter, with the secret ballot in place to prevent undue influence on the voter.<sup>138</sup> In contrast, many, although not all, forms of political speech are necessarily public, and any (legal) pushback the speaker receives is usually seen as simply the price one must pay to be politically involved.<sup>139</sup> This is not the case in every instance, as the *McIntyre* decision protecting anonymous leafleting demonstrates.<sup>140</sup>

Space limitations prohibit an in-depth analysis of this issue, but there is at least one reason that suggests smaller contributions are more akin to voting than other forms of political expression for purposes of disclosure. Like voting, our political system depends on citizen participation through financing election campaigns in order to function. Other campaign financing systems, including public financing, could be implemented; under our current system, however, candidates, political parties, and independent groups rely primarily on the financial support of others to fund their political messages. If disclosure places such funding at risk—as it does, at least in theory and perhaps in some cases, in fact—it must be justified by another concern. In the case of smaller contributions, the most highlighted concern of informing voters is not usually salient for the reasons already discussed (nor is combating corruption or the appearance of corruption likely relevant).<sup>141</sup>

These considerations therefore suggest that current contributor disclosure thresholds should be significantly increased or that the information made publicly

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137. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 672-73 (1997) (discussing whether political contributions and expenditures are more akin to voting or political speech). This point was noted by Heather Gerken during the symposium of which this Article is a part. See Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010).

138. See generally Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote* 7-17 (George Mason Law & Economics Research Paper No. 09-42, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462942](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462942) (discussing the debates in England and the United States surrounding the eventual adoption of the secret ballot).

139. See Transcript of Oral Argument, *supra* note 105, at 12.

140. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (recognizing that the decision to speak anonymously is protected by the First Amendment regardless of its motivation, which may include “fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible”).

141. See *supra* note 18 and accompanying text.

available should be limited, at least in contexts where contribution limits do not apply. As for concerns relating to corruption or the perception of corruption, to the extent they are justified, it is the higher dollar amount contributors that raise such concerns, not the \$200 or even \$1000 contributors in most instances. In some circumstances, however, lower dollar threshold may be justified for lower-cost elections, such as school boards and town councils. As Elizabeth Garrett has said in her commentary on *McConnell*, retaliation concerns “oblige drafters to tailor disclosure statutes narrowly to reveal only the information that promotes voter competence and to provide greater protection for individuals than for groups.”<sup>142</sup> For the reasons previously discussed, disclosing identifying information for smaller contributors not only does not promote voter competence, but it may also expose such contributors to retaliation.

Second, the existing disclaimer regimes do appear to be justified by the government’s interest in informing voters, but that interest would be better served if those regimes were expanded and enhanced.<sup>143</sup> The main flaw in the existing system is the ability to create misleadingly named organizations that hide the true financial supporters behind a particular communication.<sup>144</sup> One way to overcome this weakness would be to require the disclaimers to include the largest financial supporters of the organization paying for the communications.<sup>145</sup> The most prominent of the proposed federal legislative responses to *Citizens United* do in fact include a requirement to disclose the five largest financial supporters, along with additional “stand by your ad” requirements. These would require the highest ranking official of the organization paying for the communication to personally appear in the ad—as well as, in some cases, the largest funder of the ad.<sup>146</sup> Rules to prevent layers of organizations from hiding the ultimate financial supporters, such as those already in place under the disclosure regime, could be used to ensure that the actual top contributions are included in the disclaimer.<sup>147</sup>

For individuals who pay for political communications, a modicum of more information, such as the individual’s employer and position with the employer, might enhance the usefulness of the disclaimer. For example, when Don Blankenship spent over \$500,000 supporting the election of Brent Benjamin to the West Virginia Supreme Court, it might have helped to inform voters in a disclaimer on those communications that Blankenship was the chairman, chief

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142. Garrett, *supra* note 14, at 242.

143. See Kang, *supra* note 20, at 1171, 1179-81 (suggesting disclaimers in the context of direct democracy).

144. See *supra* notes 77-78 and accompanying text.

145. See Kang, *supra* note 20, at 1180-81.

146. See House DISCLOSE Act, *supra* note 6, § 214(b)(2); Senate DISCLOSE Act, *supra* note 6, § 214(b)(2); see also Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, at § 4, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy> (urging Congress to require identification of major corporate contributors of organizations that pay for election-related television advertisements in those advertisements).

147. See, e.g., 2 U.S.C. § 441d (2006); 47 C.F.R. § 73.1212(e) (2009).

executive officer, and president of the A.T. Massey Coal Company.<sup>148</sup> Similarly, it might have helped voters to know that Blankenship was one of the top contributors to “And For The Sake Of The Kids,” which also supported the candidate and opposed his opponent, at least if that information was communicated to them at the same time as this group’s political messages.<sup>149</sup> While such information was available in required state campaign finance filings, West Virginia law apparently did not require it to be included in disclaimers that were part of the communications themselves.

### CONCLUSION

More research certainly needs to be done regarding informing voters and retaliation with respect to public disclosure of contributor information. What we do know does provide some initial guidance for shaping the disclosure rules for political contributors in the post-*Citizens United* world; however, guidance is needed that goes beyond the relatively simple voter information and retaliation narratives found in that decision’s opinions. Since helping voters make better ballot-box decisions and limiting retaliation to encourage greater political participation are both desirable, disclosure and disclaimer rules that appear likely to enhance both of these goals should become part of the existing and proposed disclosure regimes.

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148. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

149. See *id.*

# WHAT CHANGES DO RECENT SUPREME COURT DECISIONS REQUIRE FOR FEDERAL CAMPAIGN FINANCE STATUTES AND REGULATIONS?

ALLISON R. HAYWARD\*

## INTRODUCTION

United States campaign finance law is riding a wave of constitutionally driven statutory change. After almost two decades of relative deference to Congress's judgment, the Supreme Court has revitalized its scrutiny of campaign regulations. While the *Citizens United v. FEC*<sup>1</sup> opinion is the most prominent and controversial evidence of this shift, it does not stand alone.

The Court's decisions have extended broad First Amendment protection to campaign activity. But the practice of campaign finance is one not of broad sweeping statements but of excruciating detail. Looking forward, academics and practitioners need to sift through statutes and begin the task of separating the defensible rules from the obsolete ones.<sup>2</sup> It is hard to appreciate how much the rules of campaign finance must change to accommodate recent Court decisions, especially if the law is to aspire to be coherent.

This essay is a first step in that process. It surveys the statutory provisions of the Federal Election Campaign Act (FECA) and selected state laws and identifies those that are constitutionally suspect in light of recent decisions. It follows a litany familiar to campaign practitioners by first considering what may have changed in the doctrine of campaign finance limits. It then moves on to evaluate the prohibitions in federal campaign finance law, including the second order restrictions on corporations and labor union "facilitation."<sup>3</sup> Finally, it addresses reporting requirements and other disclosures mandated in the statute.

## I. LIMITS

Campaign finance limits come in two basic forms. The first, spending limits, have been constitutionally restricted to "voluntary" programs since *Buckley v. Valeo*.<sup>4</sup> The second, contribution limits to candidates and political committees, have generally passed constitutional scrutiny,<sup>5</sup> although present appellate court decisions, if upheld, may change the landscape in interesting ways.<sup>6</sup> A hybrid of these limits, the aggregate limit on an individual's contributions to federal

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1. 130 S. Ct. 876 (2010).
2. Federal campaign finance law is codified at 2 U.S.C. §§ 431-57 (2006 & Supp. 2009).
3. See 11 C.F.R. § 114.2(f)(1) (2010).
4. 424 U.S. 1, 18-21 (1976).
5. See discussion *infra* Part I.B.
6. See *Buckley*, 424 U.S. at 24; *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

candidates and committees, may have an uncertain future.<sup>7</sup>

#### A. Spending Limits

At present, federal campaign finance law limits the total expenditures of presidential campaigns that opt into the voluntary general election campaign finance subsidy or the matching funds available for presidential primary candidates.<sup>8</sup> This program complies with the Court's *Buckley v. Valeo* holding that mandatory spending limits are unconstitutional, but voluntary spending limits coupled with incentives are constitutional.<sup>9</sup> The recent *Randall v. Sorrell* case gave the Court an opportunity to reconsider this position, but the Court held firm.<sup>10</sup> These incentives cannot be so generous as to make the "choice" between self-funding and tax funding elusive and the program an involuntary one in reality.

In 2008, the Supreme Court brought into play another factor to consider in challenging these programs in *Davis v. FEC*.<sup>11</sup> The Court rejected a federal rule that would have allowed candidates facing wealthy opponents to raise money at higher contribution rates.<sup>12</sup> While this decision did not implicate federal subsidies of campaigns, many state programs provided additional resources to candidates in similar situations.<sup>13</sup>

The Court in *Davis* rejected any claim that there was a permissible governmental interest in "leveling" up campaign funds.<sup>14</sup> It observed that no precedent supported a scheme that gave candidates running for the same office in the same election different contribution limits.<sup>15</sup> The effect of this law was to repress the speech of the self-funding candidate because it would "impos[e] different contribution and coordinated party expenditure limits on candidates vying for the same seat."<sup>16</sup> As a result, tax financing programs that provide additional tax funding for candidates running against wealthy self-funders may be vulnerable to a similar challenge.<sup>17</sup>

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7. See, e.g., 2 U.S.C. § 441a(a)(3) (2006), invalidated in part by *SpeechNow.org*, 599 F.3d at 696.

8. See 26 U.S.C. § 9004 (2006 & Supp. 2008).

9. *Buckley*, 424 U.S. at 19-21.

10. 548 U.S. 230, 243-44 (2006) (finding neither of respondents' arguments to overturn or limit *Buckley*'s scope persuasive).

11. 128 S. Ct. 2759 (2008).

12. *Id.* at 2773-74 (holding unconstitutional the so-called "Millionaire's Amendment" codified at 2 U.S.C. § 441a-1(a)(1)).

13. See N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 432 (4th Cir. 2008); *Day v. Holahan*, 34 F.3d 1356, 1359 (8th Cir. 1994).

14. *Davis*, 128 S. Ct. at 2773-74.

15. *Id.* at 2774.

16. *Id.*

17. See *McComish v. Brewer*, No. 08-1550, 2010 WL 2292213 (D. Ariz. Jan. 20, 2010), *rev'd*, *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). As of this writing, the Supreme Court

### B. Contribution Limits

The *Davis v. FEC* decision, while presenting potential implications for certain tax funding programs, is at bottom a contribution limit case. It stands for the intuitively appealing proposition that the government's restrictions on contributions must be evenhanded among candidates for the same office. The Court entered new constitutional territory in 2006 when it analyzed a state government's power to limit the size of campaign contributions in *Randall v. Sorrell*.<sup>18</sup>

In *Randall*, the Court evaluated Vermont's expenditure and contribution limit laws. As noted before, mandatory expenditure limits fail under modern constitutional doctrine. Contribution limits, however, have generally passed constitutional scrutiny because a contribution can resemble a gift or gratuity to a candidate (or his party) that might be a bribe, extortion payment, or might at least appear corruptive.<sup>19</sup>

In earlier challenges to contribution limits, the Court had been unwilling to evaluate the level of the limit, leaving that task to the discretion of Congress or state legislatures. But in *Randall*, Justice Breyer's plurality opinion entered this uncharted territory and concluded that the Vermont scheme was unconstitutionally restrictive.<sup>20</sup> Breyer observed that the law was quite a bit more restrictive than similar laws found in any other jurisdiction.<sup>21</sup> His method for drawing that conclusion involved a number of steps and may not be readily applicable to other regulatory cases.<sup>22</sup> Moreover, a majority of the Court expressed readiness to abandon *Buckley*'s contribution-expenditure dichotomy, but they were divided on whether that would mean treating contributions more generously or treating expenditures more restrictively.<sup>23</sup> Therefore, while *Randall* demonstrates that the Court will rule against contribution limits in extreme cases, it may not mean much more than that.<sup>24</sup>

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has stayed the appellate court's decision pending writ review. See Lyle Denniston, *Elections Subsidies Blocked*, SCOTUSBLOG (June 8, 2010, 10:26 AM), <http://www.scotusblog.com/2010/06/election-subsidies-blocked/>.

18. 548 U.S. 230 (2006).

19. *Id.* at 246-48.

20. *Id.* at 261-63.

21. *Id.* at 250-51.

22. See *id.* at 250-52.

23. Justice Alito wrote separately in *Randall*, suggesting a future re-thinking of *Buckley*. *Id.* at 263-64. Justice Kennedy, concerned about the direction of the Court in campaign finance, concurred in the judgment only. *Id.* at 264-65. Justices Thomas and Scalia attacked the *Buckley* dichotomy outright. *Id.* at 266. Finally, Justice Stevens advocated overruling *Buckley*'s protection of expenditures. *Id.* at 274.

24. As of this writing, two appellate decisions yet to reach the Court could further clarify the Court's contribution limit doctrine. See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (rejecting limits on committees that make only independent expenditures); *RNC v. FEC*, No. 08-

Given the Court's recent decisions related to contribution and expenditure limits, it appears safe to conclude that expenditure limit requirements remain unconstitutional. It would be difficult to imagine an expenditure limit that would survive strict scrutiny after *Randall*. But where does this leave the Court's modest deference since *Buckley* toward legislative judgments regarding contribution limits? Will the Court extend the close examination of limits in *Randall* to more "typical" state laws? If a majority of the Court moved beyond the "typicality" aspects of Justice Breyer's test, would it find an "important interest" sustaining the federal \$2400 per candidate per election individual contribution limit?<sup>25</sup> What would this "important interest" be? Would the Court be willing to revisit its precedent affirming these limits and demand a more specific showing that limits were calibrated to address real corruption?<sup>26</sup> Would the Court be willing to revise constitutional doctrine, subject these limits to strict scrutiny, and find them unconstitutional?<sup>27</sup>

More likely would be a challenge to the \$5000 annual contribution limit to federal political committees.<sup>28</sup> Two characteristics make this limit more vulnerable. First, unlike other federal limits, it is not adjusted for inflation.<sup>29</sup> As a consequence, although the political action committee (PAC) limit was originally meant to be more generous to committees than to candidates, the indexed candidate limit will in fairly short time overtake the committee limit.<sup>30</sup>

Second, not only is the \$5000 limit not indexed, but it was first set by Congress in 1940.<sup>31</sup> According to the Bureau of Labor Statistics, \$5000 in 1940 had the purchasing power of over \$77,000 in 2010.<sup>32</sup> This limit is not calibrated to any current threat or notion of corruption. Even if \$5000 was not arbitrary in

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1953, 2010 WL 1140721 (D.D.C. Mar. 26, 2010) (applying limits to party committees).

25. See 2 U.S.C. § 441a(a)(1)(A) (2006); *id.* § 441a(c).

26. *Contra Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000).

27. See, e.g., *Nixon*, 161 F.3d. 519, 521-22 (8th Cir. 1998), *rev'd*, 528 U.S. 377 (2000).

28. Groups with federal and nonfederal accounts can raise unlimited sums into their soft money accounts, and an FEC attempt to thwart their spending through allocation requirements has been found unconstitutional by an appellate court. See *Emily's List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009).

29. Vermont's failure to adjust certain limits for inflation was one of the many factors catching Justice Breyer's attention in his opinion in *Randall*. See *Randall v. Sorrell*, 548 U.S. 230, 238-40 (2006).

30. This is especially true when, as recent appellate decisions observe, such committees are not closely aligned with members, as contrasted with political parties. See *Emily's List*, 581 F.3d at 13.

31. See Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 443-47 (2008). Legislative history indicates that the \$5000 contribution limit was meant as a "poison pill" to defeat the bill. *Id.* at 444.

32. *Overview of BLS Statistics on Inflation and Prices*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/bls/inflation.htm> (follow "CPI Inflation calculator" hyperlink, input "5000" and year "1940," and press "calculate") (last modified June 4, 2010).

1940, it is impossible today to make that argument.<sup>33</sup>

As an aside, reexamining these contribution limits would be difficult politically. Even if the Court found the candidate and committee limits unacceptable, members of Congress would be in a position of advocating higher limits for themselves, for the PACs that in large measure give to incumbents, and for the PACs they control, colloquially known as “leadership PACs.”

Leadership PACs occupy a puzzling place in the law. The 1974 statute did not provide for them; instead, subsequent regulatory interpretations permitted them to develop.<sup>34</sup> Notwithstanding the fact that both the member’s campaign committee and his leadership PAC are under his control, the two committees are not deemed legally affiliated and thus can raise money from the same donors.<sup>35</sup> There would not seem to be any constitutional impediment preventing Congress from limiting a candidate or officeholder to one committee. Accordingly, Congress could respond by raising committee limits, but abolishing leadership PACs.

Another limit that may be vulnerable to a constitutional challenge is the hybrid contribution-expenditure limit imposed on donors. Federal law has imposed an aggregate limit on contributions since the 1974 FECA amendments.<sup>36</sup> That \$25,000 limit was upheld in *Buckley*, and the Court noted there that it had “not been separately addressed at length by the parties.”<sup>37</sup> The Court also reasoned that this limit prevented circumvention of the contribution limits, which might otherwise occur when donors give to PACs or parties likely to support their candidate.<sup>38</sup>

In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress raised the aggregate limit and indexed it for inflation.<sup>39</sup> Presently, the overall limit is \$115,500, out of which up to \$45,600 can be contributions to candidate committees. The remaining \$69,900 can be contributions to any other committees, out of which no more than \$45,600 may be given to committees that are not national party committees.<sup>40</sup>

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33. The D.C. Circuit in *Emily’s List* recently found the FEC allocation requirement onerous precisely because of the low \$5000 limit. *Emily’s List*, 581 F.3d at 21.

34. See Leadership PACs, 68 Fed. Reg. 67,013 (Dec. 1, 2003) (addressing leadership PAC rulemaking with summary of legal development); MARIAN CURRINDER, MONEY IN THE HOUSE 24-31 (2009) (discussing background of leadership PACs).

35. This relationship was clarified and made explicit in 2003 rulemaking. See 68 Fed. Reg. 67,013, 67,017-18.

36. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

37. *Id.* at 38.

38. *Id.* The Court added, unhelpfully, “[t]he limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.” *Id.*

39. See 2 U.S.C. § 441a(a)(3) (2006); 11 C.F.R. § 110.5 (2010).

40. FED. ELECTION COMM’N, CONTRIBUTION LIMITS FOR 2009-10, at 1, <http://www.fec.gov/info/contriblimits0910.pdf> (last visited Oct. 7, 2010) (stating FEC limits for 2009-10); see also 2 U.S.C. § 441a(a)(3) (base levels); *id.* § 441a(c) (indexing).

This restriction is both a contribution limit, in that it limits “contributions,” and an overall expenditure limit restricting the amount of federal “hard” money an individual can give. The anticircumvention rationale in *Buckley* does not make much sense, especially because the FEC can deem committees affiliated and thus address the circumvention that might follow from committee proliferation.<sup>41</sup> Also, contributions to committees earmarked to a candidate are deemed contributions to that candidate.<sup>42</sup> Donors who want to give more in politics may still contribute unlimited sums to non-committee political organizations (colloquially known as “527s”<sup>43</sup>), social welfare organizations exempt under Section 501(c)(4) of the Internal Revenue Code, and charities.<sup>44</sup> These vehicles are less direct, transparent, and accountable than political committees. It seems to be bad policy to drive political financial activity there.

Moreover, it is hard to justify the governmental interest in capping the overall amount of money an individual donor may contribute without similarly restricting PACs or other entities, such as Native American tribes. In short, the restriction has always made little sense, but in an era where the Court seems more willing to take a close look at campaign restrictions, the biennial limit’s days may be numbered.

To summarize, the federal statute’s present limits are not directly contradicted in any Court decisions. But it would not take much of a stretch to change that. The Court’s attitude toward constitutional doctrine may mean that the PAC limit and the biennial individual limit would not withstand a challenge.

## II. PROHIBITIONS

The FECA’s prohibitions include corporate and labor contribution and expenditure bans,<sup>45</sup> foreign national contribution and expenditure bans,<sup>46</sup> and similar bans on government contractors.<sup>47</sup> *Citizens United* held the corporate expenditure ban (and by implicit extension, the labor ban) unconstitutional. The Court specifically stated that this holding would not threaten the contribution prohibitions or the foreign national expenditure and contribution ban.<sup>48</sup>

*Citizens United*, and the *FEC v. Wisconsin Right to Life* decision that preceded it, also articulated a relatively clear content requirement for spending to be treated as an “expenditure” or an “electioneering communication.” An “expenditure” must contain express advocacy of the election or defeat of a clearly

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41. 2 U.S.C. § 441a(a)(5).

42. *Id.* § 441a(a)(8); 11 C.F.R. § 110.6 (2010).

43. Lauren Daniel, Note and Comment, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 Nw.J.L. & SOC. POL’Y 149, 150 (2010).

44. *Id.* at 158 n.72.

45. 2 U.S.C. § 441b.

46. *Id.* § 441e.

47. *Id.* § 441c.

48. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

identified candidate, and an “electioneering communication” must be the “functional equivalent” of express advocacy.<sup>49</sup>

Although *Citizens United* held unconstitutional the ban on corporate expenditures and electioneering communications, these definitions remain important. A “coordinated” expenditure or electioneering communication remains subject to the same limits, prohibitions, and reporting requirements as contributions.<sup>50</sup> In short, a corporation or union that coordinates an expenditure of express advocacy or its functional equivalent with a candidate will violate federal law.

Thus, the definition of “coordination” is extremely important, and it remains hotly debated.<sup>51</sup> The Court’s recent precedents do not address coordination specifically, but one can predict that a coordination rule that represses corporate or labor expenditures will be scrutinized closely to determine whether Congress or the FEC has unduly burdened constitutionally protected speech.

In other ways, the regulatory regime goes far beyond the statutory expenditure ban. Part 114 of Title 11 of the Code of Federal Regulations is devoted entirely to restrictions on corporate and labor activity, deriving its authority in part on the expenditure ban found unconstitutional in *Citizens United*.<sup>52</sup> These regulations, for instance, dictate to whom a corporation may communicate about politics within the corporation, or for a union, within its membership. After *Citizens United*, these restrictions are obsolete and will require considerable administrative reworking.<sup>53</sup>

#### A. *Solicitations*

Less clear is the constitutional status of the restrictions which donor

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49. *Id.* at 889; FEC v. Wis. Right to Life, 551 U.S. 449, 456-57 (2007).

50. See 2 U.S.C. § 441a(a)(7)(B) (treating expenditures that are coordinated with a candidate as contributions to the candidate’s campaign and thus subject to FECA’s limits on such contributions); 11 C.F.R. § 109.21 (2010) (defining coordinated communication).

51. See *Shays v. FEC*, 528 F.3d 914, 919-24 (D.C. Cir. 2008) (rejecting the FEC’s coordination rule for the second time); *Shays v. FEC*, 414 F.3d 76, 112 (D.C. Cir. 2005) (rejecting the FEC’s coordination rule for the first time); Coordinated Communications, 71 Fed. Reg. 33,190, 33,193 (June 8, 2006) (discussing “coordinated” activities).

52. See, e.g., 11 C.F.R. § 114.2 (2010) (prohibiting contributions, expenditures, and electioneering communications); *id.* § 114.3 (disbursing communications to restricted class in connection with a federal election); *id.* § 114.9 (using corporate or labor organization facilities.); *id.* § 114.14 (restricting the use of corporate and labor organization funds for electioneering communications).

53. As of this writing, the FEC has received a petition for rulemaking along these lines from the James Madison Center for Free Speech and has published a Supplemental Notice of Proposed Rulemaking (NPRM) on Coordinated Communications to have commenters address the impact of *Citizens United* on that rulemaking. Myles Martin, *Supplemental NPRM on Coordinated Communications*, 36 FEC RECORD 7 (Mar. 2010), available at <http://www.fec.gov/pdf/record/2010/mar10.pdf>.

corporations can solicit for contributions, either for a political committee or for a candidate. Presently, a corporation using its general treasury may solicit its executive and administrative personnel, shareholders, and the families of these individuals for PAC contributions.<sup>54</sup> This is in contrast to a nonconnected political committee, which may solicit any potential donor but must pay solicitation costs from PAC funds. In its 1982 *FEC v. National Right to Work Committee* decision, the Court upheld solicitation restrictions against a claim by the National Right to Work Committee that it could solicit a broad array of potential donors for its PAC by deeming the donors “members.”<sup>55</sup>

Still, solicitation is a form of political speech. If corporate independent expenditures cannot be limited, it is hard to justify limiting corporate independent solicitations. Some corporate PACs might welcome contributions and participation from a wider array of employees, vendors, subcontractors, investors who are not shareholders, and other people who may share the views and concerns of the company but who presently cannot be solicited.

Importantly, these regulations also exempt coordinated communications to the restricted class from being treated as contributions.<sup>56</sup> Because the Court in *Citizens United* reaffirmed the coordinated contribution ban, the restriction will likely carry forward. Thus, if a PAC were to win the argument that *Citizens United* protected its corporate-funded solicitation of any donor, it would not be able to coordinate those activities with a candidate. If the corporation solicited only its restricted class, than as under current regulations, it could coordinate with a candidate or a party committee.

### B. Facilitation

Corporations and unions are also subject to restrictions on how they raise money for federal candidates and other federal political committees. Often, this type of activity takes the form of a group of executives seeking to bundle contributions from colleagues. The “facilitation” regulations governing workplace fundraising are detailed and complex.<sup>57</sup> In general, they prohibit executives from directing staff to assist them in fundraising, require reimbursement of any corporate expenses incurred in the fundraising process (even in advance in certain situations), and forbid coercing contributions from employees. If the facilitation regulations are followed, the executives may coordinate their fundraising with a candidate without any expenses being deemed corporate contributions.

But after *Citizens United*, it is unclear whether these restrictions would be constitutional in the absence of coordination. “Facilitation” without coordination may seem unlikely and has not been a fundraising factor in the past. But this was because there was no different legal consequence between an impermissible

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54. 2 U.S.C. § 441b(b)(4).

55. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 211 (1982).

56. 11 C.F.R. § 114.3(a)(1) (2010).

57. *See id.* §§ 114.2, 114.9.

contribution and expenditure. Both actions were prohibited. If expenditures are now protected and coordination is the touchstone for determining when spending can be regulated as a “contribution,” independent facilitation of political activity appears beyond the authority of the FEC or Congress to regulate.

### C. Using Money Collected for Non-Political Purposes

In *Citizens United*, the Court endorsed the use of corporate general treasury funds for political speech.<sup>58</sup> Yet in the context of labor organizations, the Court held in *Communications Workers of America v. Beck* that in closed-shop jurisdictions (where unions can collect fees from nonunion workers), mandatory fees may not be used for purposes outside the core functions of labor collective bargaining.<sup>59</sup> Thus, unions may not use mandatory fees for politics; instead, money used for purposes other than collective bargaining should be raised separately.

Yet in *Citizens United*, the Court’s majority showed little interest in a parallel argument in the corporate context—that corporations could not use funds invested by shareholders for politics.<sup>60</sup> Admittedly, it is hard to think of a context in which an individual is compelled to invest in a firm in a manner analogous to the closed-shop dues context. Accordingly, the *Citizens United* decision may not necessarily call into question the *Beck* decision and related precedents. But the argument is not frivolous, either.

Finally, before *Citizens United*, certain nonprofit corporations could make expenditures. To comply with the Court’s decision in *FEC v. Massachusetts Citizens for Life*,<sup>61</sup> the FEC promulgated regulations setting forth the requirements for a “qualified nonprofit” to make expenditures.<sup>62</sup> These regulations are now obsolete because this right is now recognized for all corporations.

### D. Other Prohibited Sources

1. *Foreign Nationals*.—President Obama, a critic of the *Citizens United* decision, raised the specter of foreign participation in United States elections in his 2010 State of the Union address.<sup>63</sup> As noted before, the Court’s opinion declaims any effect on the laws prohibiting expenditures by foreign nationals.<sup>64</sup> Yet the Court also declared that independent expenditures are not corrupting. What other reasons would justify the foreign national ban?

Congress has more discretion to regulate foreign nationals in the authority it has over immigration, national security, and foreign affairs. However, in the First

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58. *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010).

59. *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988).

60. *Citizens United*, 130 S. Ct. at 911.

61. 479 U.S. 238 (1986).

62. 11 C.F.R. § 114.10.

63. Barack Obama, President, United States of Am., State of the Union Address (Jan. 27, 2010), available at <http://www.c-span.org/executive/state-of-the-union.aspx> (2010).

64. *Citizens United*, 130 S. Ct. at 911.

Amendment context, the Court has held that First Amendment protections apply equally to citizens and noncitizens—both are “people” entitled to constitutional protection.<sup>65</sup> As legal scholar David Cole observed (albeit before *Citizens United*), “[i]f protecting corporate speech is essential to preserving a robust public debate, so too is protecting noncitizens’ speech.”<sup>66</sup> Yet when a foreign individual wanted to volunteer for a political campaign, it took an FEC advisory opinion to confirm that it would be legal for him to do so.<sup>67</sup>

Especially outside the immigration context, if we sincerely embrace the notion that the solution to false or dangerous speech is more speech, not enforced silence, it is very difficult to justify an independent expenditure ban on individuals legally present in the United States as professionals, students, or visitors.<sup>68</sup> These people who happen to be foreign nationals also pay taxes, depend upon infrastructure, education, and social services and should have no less a role in the community’s debate about paying for and providing public goods and services.<sup>69</sup>

However, does this tolerance necessarily extend to foreign corporations? Would the Court instead recognize that the federal government has greater discretion to regulate in this area, given the diplomatic, national security, and foreign affairs issues that accompany restrictions on foreign interests? Would it consider such restrictions analogous to other special regulatory regimes applied to foreign businesses?<sup>70</sup> The answer should be that it would recognize such discretion, provided the law bore some relationship to national security or diplomacy. Even here, if the Court saw that Congress was using fractional foreign ownership as a pretext to extend a speech ban to corporations, it might conclude that Congress had acted unconstitutionally. The mere fact that some foreign interest was involved might be insufficient to survive scrutiny, especially since the ban would silence Americans also involved in the enterprise.

In the concern over the influence of aliens in American elections, we should be reflective enough to consider how other nations may view American

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65. DAVID COLE, ENEMY ALIENS 211-13 (2003).

66. *Id.* at 217.

67. FED. ELECTION COMM’N, FEC ADVISORY OPINION No. 1987-25 (Sept. 17, 1987), <http://herndon3.sdrdc.com/ao/no/870025.html> (last visited July 31, 2010).

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If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

69. Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding unconstitutional a city’s redistricting plan which excluded blacks from participating in municipal elections).

70. See, e.g., Foreign Investment and National Security Act of 2007 (FINSA), Pub. L. No. 110-49, 121 Stat. 246 (2007); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-608, SOVEREIGN WEALTH FUNDS: LAWS LIMITING FOREIGN INVESTMENT AFFECT CERTAIN U.S. ASSETS AND AGENCIES HAVE VARIOUS ENFORCEMENT PROCESSES (2009).

participation in their elections. Americans with dual citizenship are important voting blocs for a number of other nations' politicians. American political consultants have shaped campaigns globally.<sup>71</sup> A Carnegie Endowment op-ed described U.S. involvement in Ukraine elections:

Did Americans meddle in the internal affairs of Ukraine? Yes. The American agents of influence would prefer different language to describe their activities—democratic assistance, democracy promotion, civil society support, etc.—but their work, however labeled, seeks to influence political change in Ukraine. The U.S. Agency for International Development, the National Endowment for Democracy and a few other foundations sponsored certain U.S. organizations, including Freedom House, the International Republican Institute, the National Democratic Institute, the Solidarity Center, the Eurasia Foundation, Internews and several others to provide small grants and technical assistance to Ukrainian civil society. The European Union, individual European countries and the Soros-funded International Renaissance Foundation did the same.<sup>72</sup>

Understandably, many Americans view U.S.-sponsored electoral activity favorably, yet remain suspicious about the motives and sincerity of foreign nationals who want to instruct Americans about their political leadership.

Caution may be prudent when considering the involvement of foreign governments, state-sponsored corporations, unions, parties, and the like, in American politics. Even so, it made little sense even before *Citizens United* to abridge the activities of foreign individuals legally in the United States and subject to our laws. Given the Court's attitude toward closer scrutiny, a challenge to the scope of this law might be successful.

2. *Government Contractors and Congressionally Chartered Corporations*.—Federal campaign finance statutes presently forbid government contractors and congressionally chartered corporations from making expenditures.<sup>73</sup> Those restrictions have not had much impact because these entities are often also ordinary corporations. Thus, the expenditure ban that has been applicable to corporations has also prevented them from making expenditures. It is unclear how the Court would apply its *Citizens United* reasoning to these contexts. Read broadly, the holding that independent expenditures are “not corrupt[ing]”<sup>74</sup> would suggest that these entities should also be able to make expenditures.

As with the rights of foreign nationals, the answer in the contractor and

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71. Fritz Plasser, *American Campaign Techniques Worldwide*, 5 HARV. INT'L J. PRESS/POL. 33, 54 (2000); Roman Olearchyk, *U.S. Political Advisers Add Polish to Ukraine Election Candidates*, FIN. TIMES, Jan. 28, 2010.

72. Michael McFaul, ‘Meddling’ In Ukraine; Democracy Is Not an American Plot, WASH. POST, Dec. 21, 2004, at A25.

73. See 2 U.S.C. § 441b (2006); see also id. § 441c; 11 C.F.R. § 115.2 (2010) (describing federal contractor ban).

74. See *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

congressionally chartered corporations contexts may not be so simple. The Court rejected the expenditure ban in *Citizens United* in part because it was broad and undifferentiated.<sup>75</sup> The ban did not respond to any evident threat to politics from corporations as such.<sup>76</sup> Thus, part of the defect with that section of the statute was its lack of tailoring and the flawed notion that all corporations of whatever size and structure are equally dangerous to democracy.<sup>77</sup>

These may, however, be special cases. With government contractors and congressionally chartered corporations, as with foreign corporations, Congress may be permitted greater discretion to craft expenditure restrictions that respond to a genuine identifiable threat of corruption. Congress and executive branch agencies have latitude to set prerequisites for the companies that contract with the government.<sup>78</sup> Thus, Congress could identify a greater risk of corruption from companies that receive no-bid federal government contracts because the competitive bidding process is not able to buffer the potential for undue influence between the contractor and governmental actors. Alternatively, Congress might structure such a regulation as an anti-“pay to play” law by disqualifying corporations and unions that make expenditures from receiving no-bid contracts. Congressionally chartered corporations, for their part, are discrete entities created by Congress, and unlike regular corporations they are imbued with a “public” purpose. Congress has a distinctive ability to set their mission and power with this small set of entities.<sup>79</sup>

Similarly, post-*Citizens United*, state and local jurisdictions may remain able to restrict the political expenditures of certain kinds of businesses if, in that jurisdiction’s experience, the field has posed special problems of corruption in politics.<sup>80</sup> At present, various jurisdictions have imposed additional restrictions on political activities by alcoholic beverage licensees,<sup>81</sup> gaming licensees,<sup>82</sup>

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75. *Id.* at 911.

76. *Id.*

77. *See id.*

78. Federal procurement is governed by the fifty-three part Federal Acquisition Regulation. See 48 C.F.R. pts. 1-53 (2010). For example, the federal government can demand that federal contractors observe additional hiring and recruitment policies beyond that demanded of ordinary business. *See About OFCCP*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/aboutof.html> (last visited Oct. 10, 2010) (summarizing the necessary requirements).

79. An example of a congressionally chartered corporation would be Freddie Mac. *See* Federal Home Loan Mortgage Corporation Act of 1970, Pub. L. No. 91-351, § 301, 84 Stat. 450 (prior to 2009 amendment).

80. An interesting, if dated, description of political practices of certain “special sources” is in chapter 6 of ALEXANDER HEARD, THE COSTS OF DEMOCRACY 142-68 (1960).

81. *See, e.g.*, VILLAGE OF DOWNERS GROVE, ILL., CODE § 3.22SEC (Conduct of Licences/Prohibited Campaign Contributions); Schiller Park Colonial Inn v. Berz, 349 N.E.2d 61 (Ill. 1976).

82. *See, e.g.*, N.J. STAT. ANN. § 5:12-138 (West 2010), *upheld in* Soto v. New Jersey, 565 A.2d 1088 (N.J. Super. App. Div. 1989); *see also* IOWA CODE ANN. § 99F.6 (West, Westlaw through 2010 Reg. Sess.); IND. CODE § 4-33-10-2.1 (2010); MICH. COMP. LAWS ANN. § 432.207b

racetrack operations,<sup>83</sup> contractors,<sup>84</sup> and public utilities.<sup>85</sup> Again, however, the Court would probably look behind the bare assertion of corruption and find the restriction unconstitutional if it is presented with a pretext unsupported by history or experience. After *Citizens United*, strict scrutiny means exactly that.

### III. REPORTING REQUIREMENTS AND DISCLAIMERS

The “transparency” provisions of federal election law emerged from *Citizens United* with a ringing endorsement.<sup>86</sup> Seemingly channeling Perry Belmont and the National Publicity Law movement of the early twentieth century,<sup>87</sup> the Court endorsed disclaimers and disclosure as an appropriate means to thwart corruption and inform voters of the interests behind candidates.<sup>88</sup> The handful of situations where the Court has found disclaimers and disclosure unlawful have remained restricted to interpersonal political exchange, as in *McIntyre v. Ohio Elections Commission*<sup>89</sup> and radical minor political movements, as in *Brown v. Socialists Workers '74 Campaign Committee*.<sup>90</sup>

However, both the disclosure requirements in *Citizens United* and the exceptions in these more specific cases involved disclosure and disclaimer requirements that were attached to discrete electoral activities. In *Citizens United*, the Court upheld the BCRA requirement that anyone making electioneering communication expenditures over \$10,000 must file a statement listing the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.<sup>91</sup> In *McIntyre*, the Court found unconstitutional the requirement that an individual put her name on anti-

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(West, Westlaw though 2010 Reg. Sess.); *see generally* Donna B. More et al., *Access Denied: Casinos, Campaign Contributions and the Constitution*, 2 GAMING L. REV. 425 (1998).

83. *See, e.g.*, VA. CODE ANN. § 59.1-375 (LEXIS through 2010 Reg. Sess.).

84. *See* IND. CODE § 4-30-3-19.5 (2010); KY REV. STAT. ANN. § 121.056 (West, Westlaw through 2010 leg.); OHIO REV. CODE ANN. § 3517.13(J) (West, Westlaw through 2010 File 54 of the 128th GA); S.C. CODE ANN. § 8-13-1342 (Supp. 2009); W. VA. CODE ANN. § 3-8-12(d) (West, Westlaw through 2d Extraordinary Sess.); Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995); Green Party of Conn. v. Garfield, 537 F. Supp. 2d 359 (D. Conn. 2008), *aff'd in part and rev'd in part*, 616 F.3d 189, 616 F. 3d 213 (2d Cir. 2010).

85. The Public Utility Holding Act of 1935 prohibited public utilities from making contributions and expenditures in federal races but was repealed in 2006. *See* Public Utility Holding Act of 1935, ch. 687, 49 Stat. 803m, *repealed by* Public Utility Holding Company Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594; *see also* GA. CODE § 21-5-30(f) (2010).

86. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

87. *See, e.g.*, PERRY BELMONT, RETURN TO SECRET PARTY FUNDS (photo. reprint 1974) (1927).

88. *Citizens United*, 130 S. Ct. at 913-15.

89. 514 U.S. 334 (1995).

90. 459 U.S. 87 (1982).

91. *Citizens United*, 130 S. Ct. at 914-15.

school bond flyers.<sup>92</sup> In *Brown*, a record of official and unofficial harassment permitted the Socialist Workers Party committee to be exempt from campaign finance disclosure requirements.<sup>93</sup>

Ordinarily, these disclaimers and disclosure requirements are justified and constitutional. In the context of corporate and labor expenditures, however, it is less clear how the Court would view reporting requirements that go beyond disclosing what other entities directly give to support an expenditure, to encompass donors who give with no strings attached. In such cases, the connection between the donation and political activities is much more remote. Similarly, it is less clear how much more information Congress could require on a disclaimer. Because disclaimer and disclosure requirements do not ban speech, as the contribution ban did, the Court may give Congress relatively freer reign to craft requirements. As the Court stated in *Citizens United*, “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”<sup>94</sup>

At some point, however, disclaimer and disclosure requirements intrude on free association interests, such as those the Court found compelling in *NAACP v. Alabama*.<sup>95</sup> There, the State of Alabama insisted that the NAACP produce membership lists, which it argued could show whether the NAACP should be required to file state corporate paperwork as an out-of-state enterprise.<sup>96</sup> The Court protected these membership lists under the First Amendment because their production would burden members simply because they had chosen to associate with the NAACP.<sup>97</sup> Similarly, if Congress moves beyond disclosure that is connected to political activity, and requires unreasonable or unduly burdensome disclosure (e.g., of all donors or all dues-paying members) as an indirect means of chilling protected speech, the Court could revisit its deferential treatment of disclaimer and disclosure requirements.

#### IV. POLITICAL COMMITTEE STATUS

Limits, prohibitions, and reporting requirements all come together when a group becomes a political committee. The statute itself is quite strict. A group that takes \$1000 in contributions or makes \$1000 in expenditures for the purpose of influencing an election for federal office must register with the Federal Election Commission, follow the \$5000 contribution limit, follow prohibitions on contributions from corporations, unions, and other prohibited sources, and file regular reports of its financing and disbursements.<sup>98</sup> If that were the law alone, then *Citizens United* would mean little. Once a corporation made \$1000 in

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92. *McIntyre*, 514 U.S. at 356-57.

93. *Brown*, 459 U.S. at 101-02.

94. *Citizens United*, 130 S. Ct. at 916.

95. 357 U.S. 449 (1958).

96. *Id.* at 452-54.

97. *Id.* at 461-63.

98. See 2 U.S.C. § 431(4) (2006); *id.* §§ 432, 433.

expenditures, it would need to spend every dollar thereafter out of a PAC.

But in *Buckley*, the Court interpreted the committee threshold to apply only if the group was itself under the control of a candidate or political party or had as its major purpose “the nomination or election of a candidate.”<sup>99</sup> Subsequent judicial interpretation of the so-called “major purpose” test, and various FEC regulatory initiatives, has rendered a mixed bag.<sup>100</sup> Some situations are clear-cut. At one extreme, a “shell” corporation formed solely to make expenditures in elections would be required to follow the political committee rules, including the limits and prohibitions on contributions to it.<sup>101</sup> At another extreme, a multifaceted multimillion-dollar corporation that used general treasury funds to make \$1500 in expenditures would not be required to follow these rules.<sup>102</sup>

But future challenges will arise as corporate spenders and FEC regulators tussle over the line in the middle. Does “major purpose” mean expenditures of over fifty percent of the corporation’s total spending? In what time period? What if the group has numerous purposes, but making political expenditures is the largest of its expenses.<sup>103</sup> What role should statements about the group’s “purpose” play in its formative documents, literature, and fundraising in this determination?

## CONCLUSION

The statute governing federal campaign finance requires an overhaul in the wake of the Court’s development of constitutional doctrine. The Court has not only endorsed political expression by incorporated groups and unions, but has also taken a close look at areas where Congress and state legislatures impose burdensome or unwarranted restrictions. The Court stands ready to offer robust protection for political speech and association by groups—unless the group is a political party or a candidate’s campaign committee.

That dichotomy troubles many observers.<sup>104</sup> Parties and candidate campaign

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99. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

100. See, e.g., Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

101. See *Buckley*, 424 U.S. at 79; Political Committee Status, 72 Fed. Reg. 5595.

102. See *Buckley*, 424 U.S. at 79; Political Committee Status, 72 Fed. Reg. 5595.

103. As of this writing, another appellate court decision could potentially limit “major purpose” drastically. *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010). The court held that a committee formed to ultimately support a ticket chosen in the future via Internet convention would not need to register and report until it had chosen a specific candidate to support. *Id.* at 869. In contrast, the FEC had advised the group that it would become a political committee once it spent \$1000 to obtain ballot access. *Id.* at 863. The court read literally *Buckley*’s rule that a committee would only be formed to support “a candidate.” *Id.* at 867 (quoting *Buckley*, 424 U.S. at 79). Yet another case challenging “major purpose,” *Real Truth About Obama, Inc. v. FEC*, was also working its way through the federal courts before the Supreme Court vacated the judgment and remanded the case back to the Fourth Circuit. 575 F.3d 342 (4th Cir. 2009), vacated, 130 S. Ct. 2371 (2010) (mem.).

104. See, e.g., *Defining the Future of Campaign Finance in an Age of Supreme Court*

committees are designed to participate in politics, yet they are relatively disadvantaged at present. To resolve this situation today, Congress should rework restrictions on parties rather than attempt to indirectly burden outside groups.<sup>105</sup>

Congress should embrace the opportunity to revise the campaign finance restrictions to make them clearer, simpler, and less burdensome. Perhaps members believe political regulation is shrewd politics or even good government. But in an era of increasing dissatisfaction with the performance of the federal government, one can wonder whether embracing the changing tide might be the shrewder alternative. That approach, of course, would have the additional benefit of being better aligned with the Constitution and its respect for and protection of political speech.

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*Activism: Hearing Before the Comm. on House Admin.*, 111th Cong. 15-27 (2010) (statement of Robert D. Lenhard, Former Chairman, Fed. Election Comm'n).

105. *Id.*

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## NOTE

### SEXTING: A RESPONSE TO PROSECUTING THOSE GROWING UP WITH A GROWING TREND

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#### INTRODUCTION

Hope liked a boy and sent him a photo showing her breasts.<sup>1</sup> The photo eventually made its way around Hope's entire school.<sup>2</sup> The school suspended Hope, and she returned to school to face a barrage of insults as students called her a “‘whore’ and [a] ‘slut.’”<sup>3</sup> Three months later, Hope’s mother found her daughter dead, all of thirteen years old, after “Hope [hung] herself in her bedroom.”<sup>4</sup>

Like Hope’s tragic story, the debate over how to respond to “sexting” has headlined news outlets over the past several years.<sup>5</sup> A minor creates a “sex” message by “tak[ing] a picture of him- or herself with a digital camera or cell phone camera, or ask[ing] someone else to take that picture.”<sup>6</sup> In a high school class of one hundred students, perhaps as many as twenty of these students will have sent sexually explicit images to each other by cell phone.<sup>7</sup> Prosecutors

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1. Andrew Meacham, *A Shattered Self-Image*, ST. PETERSBURG TIMES, Nov. 29, 2009, at 1A, available at 2009 WLNR 24167487.

2. *Id.*

3. *Id.*

4. *Id.* While not as tragic in their endings, many stories surrounding incidents of sexting follow similar fact patterns. See, e.g., Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, 43 PROSECUTOR 28, 28 (Mar. 2009).

5. Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 1-3 (2009).

6. Miller v. Skumanick, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009), *aff’d sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

7. See NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), available at <http://www>.

threaten legal action,<sup>8</sup> and students' peers ridicule teens<sup>9</sup> appearing in the images.

The law has failed to adapt quickly enough to teens sending these images. In response to sexting, prosecutors have utilized laws originally intended for child predators,<sup>10</sup> such as child pornography statutes.<sup>11</sup> Many of these statutes define the prohibited acts using broad language. For example, Pennsylvania's child pornography statute, the statute under which teens could be prosecuted for sending sext messages, prohibits depictions of minors "engag[ed] in a prohibited sexual act."<sup>12</sup> Nudity is included in the definition of a "prohibited sexual act" if the depiction is sexually stimulating.<sup>13</sup> For parents and teens facing an aggressive prosecutor, this takes the phrase "in the eye of the beholder" to a whole new level. A conviction under a child pornography statute, "even in juvenile court," may require classification and registration as a sex offender for the juvenile.<sup>14</sup> This registration includes "community notification requirements."<sup>15</sup> In Oregon, a judge analogized a sexting conviction to *The Scarlet Letter*'s Hester Prynne and stated that the "sex offender label" could "brand[ ] [the letter] "'A' on [a teen's] forehead for the rest of [her] life."<sup>16</sup>

Part I of this Note details the history and rationale governing the juvenile justice system, as well as recent changes to the system. Part II looks at child pornography laws, the justifications behind them, and recent cases discussing how to address juveniles who create pornography. Part III details the recent phenomenon of sexting and surveys several state bills adopted or considered across the country. Finally, Part IV proposes changes to state laws and attempts

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thenationalcampaign.org/sextech/PDF/SexTech\_Summary.pdf. But see Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 154 (2009) (arguing that the survey does not accurately portray the true scope of the problem); Carl Bialik, *Which Is Epidemic—Sexting or Worrying About It?*, WALL ST. J., Apr. 8, 2009 (criticizing the survey's procedure in gathering its sample).

8. Richards & Calvert, *supra* note 5, at 3-5.

9. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 656 n.24 (2009).

10. See Shannon P. Duffy, 'Sexting' Case to Take Center Stage at 3rd Circuit, LEGAL INTELLIGENCER, Jan. 14, 2010, at 1, available at 2010 WLNR 752642 (discussing *Miller v. Skumanick* and the prosecutor's appeal of the district court's injunction to prevent opportunity to bring prosecution under child pornography laws).

11. See *Skumanick*, 605 F. Supp. 2d at 637-38 (observing that conviction under child pornography law could "give even juveniles a permanent record").

12. 18 PA. CONS. STAT. ANN. § 6312(b) (West, Westlaw through 2010 legislation).

13. *Id.* § 6312(g).

14. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 535-36 (2008) (citing Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 46-47 (2007)).

15. *Id.*

16. Lori Tobias, *Teenager Gets Jail in 'Sexting' Case*, OREGONIAN, Oct. 17, 2009, available at 2009 WLNR 20589470.

to merge the strengths of adopted or proposed state bills and rationales underlying the juvenile court system and child pornography laws.

### I. EXPLANATION OF THE JUVENILE COURT SYSTEM

Prior to 1899, states tried children in adult courts, and a child's lone defense was to rely on the "common law infancy defense . . . as the only protection" from adult sentences.<sup>17</sup> In 1899, Illinois passed a statute creating a court for juveniles, which every other state soon imitated.<sup>18</sup> States derived their power to regulate juvenile offenses from the doctrine of *parens patriae*,<sup>19</sup> which asserts that states provide "protection to those unable to care for themselves."<sup>20</sup> The doctrine seemingly gave states the right to withhold procedural due process safeguards to protect children's rights because the states did not view children as needing those safeguards.<sup>21</sup> States could also interfere with parents' "fundamental" but limited rights "to raise their children"<sup>22</sup> if the parents failed and the child was deemed "delinquent."<sup>23</sup>

Proponents for a separate system for juveniles based their arguments on rehabilitating juveniles and "sav[ing] [them] from a downward career."<sup>24</sup> Thus, theoretically, "[t]he avowed priority of our juvenile justice system . . . has, historically, been rehabilitation rather than retribution."<sup>25</sup> An emphasis on rehabilitation has also led the juvenile court system to be primarily private in nature.<sup>26</sup> Contrary to the rationale of public adult hearings, the prevailing view in juvenile law has been that children need protection from "any public

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17. Courtney P. Fain, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495, 498 (2008) (citing BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 47 (1999)).

18. *See In re Gault*, 387 U.S. 1, 14-15 (1967).

19. Leary, *supra* note 14, at 26 (arguing that the state's police power and the doctrine support intervention and defining the "doctrine as the basis for government intervention in the lives of children who were exposed to danger because of the failure of those responsible for the children's safety to protect them") (citing *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)).

20. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

21. *In re Gault*, 387 U.S. at 17.

22. Leary, *supra* note 14, at 26-27 (citing *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting)).

23. *In re Gault*, 387 U.S. at 17.

24. *Id.* at 15 (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

25. *United States v. Juvenile Male*, 581 F.3d 977, 978 (9th Cir. 2009), *amended and superseded by* 590 F.3d 924 (9th Cir. 2010), *and certifying questions to* 130 S. Ct. 2518 (2010).

26. Fain, *supra* note 17, at 500 (citing David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 61 (Margaret K. Rosenheim et al. eds., 2002)).

humiliation and stigmatization that might otherwise hamper rehabilitation.”<sup>27</sup> This notion of privacy promotes rehabilitation through “‘clinical’ procedures ‘rather than punitive’ ones.”<sup>28</sup> Without this confidentiality, the “stigma” of being adjudicated as a delinquent could limit a child’s future opportunities in his educational and professional life.<sup>29</sup>

Juvenile courts have also justified imposing punishment based on the traditional rationales of deterrence, incapacitation, and retribution.<sup>30</sup> As it stands, the juvenile court system can work to deter juveniles from committing future acts that would require them to be adjudicated as delinquents.<sup>31</sup> Critics of the system, however, have questioned whether the rehabilitation and deterrence methods can coexist.<sup>32</sup> Their concern rests on the idea that reduced punishments aimed at rehabilitation may not provide enough of a deterrent effect against future criminal activity.<sup>33</sup>

Over the past forty years, legislatures, prosecutors, and shifts in public opinion have moved juvenile courts closer to the retribution model.<sup>34</sup> The retribution model inherently holds that juveniles must be responsible for their actions.<sup>35</sup> Proponents of rehabilitation, though, have criticized more severe responses because the likelihood of repeat offenses decreases as juveniles mature.<sup>36</sup> Critics also point to additional societal costs and occasional severe sentences that seem inherently unfair in a system founded on the concept of treatment.<sup>37</sup>

As juvenile courts have become more sophisticated, the Supreme Court has added additional procedural safeguards to protect juveniles. In *Kent v. United States*, due process and fairness required that a juvenile was “by [federal] statute entitled to certain procedures and benefits as a consequence of his statutory right to the ‘exclusive’ jurisdiction of the [j]uvenile [c]ourt.”<sup>38</sup> The Court also noted that the state’s unique relationship with minors in its *parens patriae* capacity did

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27. *Id.*

28. *Juvenile Male*, 581 F.3d at 984 (quoting *In re Gault*, 387 U.S. at 15-16).

29. See Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 272 (2008).

30. ROBERT H. MNOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 737 (5th ed. 2005).

31. *Id.* at 742.

32. See *id.* at 742-44.

33. *Id.* at 743.

34. Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1554 (2002).

35. MNOKIN & WEISBERG, *supra* note 30, at 745.

36. *Id.* at 743-45.

37. *Id.* at 744.

38. *Kent v. United States*, 383 U.S. 541, 557 (1966).

not give the state the right to exercise “procedural arbitrariness.”<sup>39</sup> In *In re Gault*, the Court held that a juvenile was entitled to the same procedural due process safeguards he would have received outside of juvenile court.<sup>40</sup> Writing for the majority, Justice Fortas stated that “the condition of being a boy does not justify a kangaroo court.”<sup>41</sup>

Historically, the Court has left juvenile court punishments to the states.<sup>42</sup> The Court has, however, acknowledged that juveniles are different from adults.<sup>43</sup> This basic age difference permits the juvenile court system to view delinquents as “changeable and to some extent malleable entit[ies].”<sup>44</sup> Therefore, the central question is “[w]hen should a person be treated as an adult?”<sup>45</sup> Although as a society, our answer to this seems to be “consistent . . . [only in] our inconsistency,” the Court has slightly illuminated our inquiry.<sup>46</sup> Furthermore, legal scholars have pointed to scientific research illustrating that teenagers are different from adults in terms of “psychosocial, physical, and neurological traits.”<sup>47</sup>

Recent research indicates that teenagers adopt others’ “attitudes, values, and behaviors” to form their “individual identity, autonomy, interpersonal intimacy, sexuality and personal achievement.”<sup>48</sup> In *Roper v. Simmons*,<sup>49</sup> the Court cited

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39. *Id.* at 555.

40. *In re Gault*, 387 U.S. 1, 13, 29 (1967).

41. *Id.* at 28.

42. Adam Liptak, *Supreme Court Set to Hear Appeals on Life in Prison for Youths Who Never Killed*, N.Y. TIMES, Nov. 8, 2009, at A24, available at 2009 WLNR 22359769.

43. See Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: “Kids Are Just Different” and “Kids Are Like Adults” Advocacy Strategies*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 273, 277 (2008) (discussing various instances when child advocates should argue that “kids are just different”).

44. FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* 150 (2004); see also Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL’Y & L. 486, 488 (2010) (discussing 2007 article by author that identified two jurisprudence lines of conflict with sexting, including “juvenile law’s recognition that juveniles are often less aware of the social harms their illegal behavior can cause and are less culpable”).

45. Catherine Rampell, *How Old is Old Enough?*, N.Y. TIMES, Nov. 15, 2009, at WK5, available at 2009 WLNR 22970554.

46. *Id.*

47. Jennifer Ann Drobac, *I Can’t to IKant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675, 679 (2007).

48. Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 27 (2006).

49. 543 U.S. 551 (2005). Although *Roper* addressed death penalty sentences for juveniles, the Court recently addressed another case dealing with juvenile life sentences that some see as “the *Brown v. Board of Education* of juvenile law.” Liptak, *supra* note 42; see also Catherine Arcabascio, *Sexting and Teenagers: OMG R U Going 2 Jail???,* 16 RICH. J.L. & TECH. 1, 4-5

evidence that children are different from adults in terms of maturity, vulnerability to “negative influences and outside pressures,” and the fact that their personalities are less developed than those of adults.<sup>50</sup> As an adolescent ages, his brain continues to grow and mature, refining the ability to reason, rely on “‘gut’ responses,”<sup>51</sup> rationalize, and assess risky situations.<sup>52</sup> This process continues well into a person’s twenties.<sup>53</sup> Furthermore, a teenager’s neurological features are also less developed than those of a person in his twenties.<sup>54</sup> The younger the individuals are, the less able they are to grasp risks or comprehend the result of taking those risks.<sup>55</sup> Older teens face outside influences on their judgment, such as “peer and parental influence, temporal perception and risk perception,” that affect them more than they would affect similarly situated adults.<sup>56</sup> This discrepancy leads to a tendency for teenagers to favor thinking about their immediate circumstances and “demonstrate a preference for sensation-seeking.”<sup>57</sup>

Research, however, has not provided a clear marker of when children become adults.<sup>58</sup> Indeed, studies have confirmed what “[a]ny parent of a teenager will tell you that, no matter how smart [his or her] teenager is, odds are that he or she will have lapses in judgment during those hormone-driven, development years”<sup>59</sup> and that some teens grow up faster than others. Of note is the finding that children and adults possess more similar cognitive abilities than previously thought.<sup>60</sup> Cognitive ability alone, however, is not the only factor in juvenile decisionmaking.<sup>61</sup> The other decisionmaking skills that separate and illustrate different priorities of juveniles and adults also help to explain why teens may be

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(2010), available at <http://jolt.richmond.edu/v16i3/article10.pdf> (discussing *Roper* and teenage brain development); Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035 (2010) (referencing *Roper* and stating that the courts have looked towards juvenile scientific research and found that “child offenders [are] less culpable and more capable of reform”).

50. *Roper*, 543 U.S. at 569-70.

51. Drobac, *supra* note 48, at 15 (quoting Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, in INSIDE THE TEENAGE BRAIN, FRONTLINE, available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html>).

52. *Id.* at 12-19.

53. *Id.* at 19.

54. See *id.* at 16-18 (discussing new research findings regarding the maturation process of individuals’ neurological development).

55. *Id.* at 25-26.

56. *Id.* at 26-27 (quoting Jennifer L. Woolard, *Capacity, Competence, and the Juvenile Defendant*, in CHILDREN, SOCIAL SCIENCE, AND THE LAW 270 (Bette L. Bottoms et al. eds., 2002)).

57. Drobac, *supra* note 47, at 715 (citing Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1773 (1995)).

58. Rampell, *supra* note 45.

59. Arcabascio, *supra* note 49, at 4-5.

60. Drobac, *supra* note 47, at 714 (citing Cauffman & Steinberg, *supra* note 56, at 1768).

61. *Id.*

more willing to engage in what many adults would define as risky behavior.<sup>62</sup>

Notwithstanding this research, the idea that “kids are just different”<sup>63</sup> does not permeate all state and federal statutes. This is especially true in terms of registering juveniles as sex offenders. Critics of juvenile registration point out that this practice conflicts with the privacy and rehabilitation goals of the juvenile court system.<sup>64</sup> Nevertheless, a trend of grouping juvenile and adult sex offenders exists in recent state law provisions.<sup>65</sup> Before the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”)<sup>66</sup> passed, “[thirty-two] states required youth adjudicated in juvenile court to register” if convicted of a sex offense.<sup>67</sup> However, these statutes vary significantly from state to state.<sup>68</sup> Notably, not all of the states have required juvenile information to be made available to the general public.<sup>69</sup>

Recent federal enactments have altered juvenile registry requirements. Specifically, the Adam Walsh Act placed adult and juvenile offenders on the same registries.<sup>70</sup> Prior to the Adam Walsh Act, juveniles were only required to register if they were “prosecuted and convicted as adults.”<sup>71</sup> Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA),<sup>72</sup> applies the term “convicted” to adjudicated delinquency; it only applies “if the offender is at least fourteen years old and the offense adjudicated is comparable or more severe than the federal crime of aggravated sexual assault, or if the offender made an attempt or was involved in a conspiracy to commit such a crime.”<sup>73</sup> The guidelines define “aggravated sexual abuse” according to 18

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62. *Id.* at 714-15.

63. See Poncz, *supra* note 43, at 273.

64. Markman, *supra* note 29, at 283-84.

65. *Id.* at 280.

66. 42 U.S.C. § 16901 (2006 & Supp. 2008).

67. CTR. FOR SEX OFFENDER MGMT., *Section 7: The Legal & Legislative Response, in THE EFFECTIVE MANAGEMENT OF JUVENILE SEX OFFENDERS IN THE COMMUNITY* (on file with author).

68. Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 CATH. U.L. REV. 817, 830 (2008) (citing Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 177-79 (2003)).

69. CTR. FOR SEX OFFENDER MGMT., *supra* note 67.

70. Neil F. Wilson, Note, *No Child Left Behind: The Adam Walsh Act and Pennsylvania Juvenile Sex Offenders*, 70 U. Pitt L. REV. 327, 336 (2008); see also Leary, *supra* note 14, at 45-46 (discussing Adam Walsh Act and arguing that it should not prevent a juvenile court response when juveniles transmit images).

71. CTR. FOR SEX OFFENDER MGMT., *supra* note 67.

72. 42 U.S.C. § 16911 (2006); SORNA, OFFICE OF JUSTICE PROGRAMS, <http://www.ojp.usdoj.gov/smart/sorna.htm> (last visited July 25, 2010); see also Arcabascio, *supra* note 49, at 9 n.37 (discussing Adam Walsh Act).

73. Wilson, *supra* note 70, at 332 (citing 42 U.S.C. § 16911).

U.S.C. § 2241.<sup>74</sup> According to the United States Code, aggravated sexual abuse is performed through force, by rendering the victim unconscious, or by committing a sexual act on a child under the age of twelve.<sup>75</sup> It is important to note, though, that SORNA merely “defines minimum standards.”<sup>76</sup> Furthermore, it requires registration for juveniles who are convicted in adult court for a sexual offense,<sup>77</sup> such as “offenses whose gravamen is creating or participating in the creation of sexually explicit visual depictions of persons below the age of 18, making such depictions available to others, or having or receiving such depictions.”<sup>78</sup>

## II. CHILD PORNOGRAPHY LAWS AND THE ISSUE OF JUVENILES CREATING PORNOGRAPHY

Child pornography is outlawed everywhere in the United States.<sup>79</sup> Tragically, the volume of child pornography in existence has been growing over the past two decades.<sup>80</sup> The Internet has clearly facilitated this disturbing trend, as evidenced by the thousands of child pornography images uploaded to the Web.<sup>81</sup>

### *A. The Supreme Court’s Response to Child Pornography Statutes*

The First Amendment generally provides broad protection to speech, but the Supreme Court has acknowledged a number of exceptions to this protection.<sup>82</sup> Specifically, the Court has held that the First Amendment does not protect obscene material.<sup>83</sup> In *Miller v. California*, the Court determined that material was obscene if it met three requirements.<sup>84</sup> Previously, the Court had held that a state could not “mak[e] mere private possession of obscene material a crime.”<sup>85</sup>

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74. Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*, 20 NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE UPDATE, nos. 9-10, at 2-3 (2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/practitioner\\_guide\\_awa.pdf](http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf).

75. 18 U.S.C. § 2241 (2006 & Supp. 2009).

76. OFFICE OF JUSTICE PROGRAMS, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 1, 16, available at [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf) (last visited Sept. 29, 2010).

77. *Id.* at 15-16.

78. *Id.* at 20.

79. ZIMRING, *supra* note 44, at 20.

80. Leary, *supra* note 14, at 8 (citing *Internet Porn ‘Increasing Child Abuse,’* THE GUARDIAN (Jan. 12, 2004), <http://society.guardian.co.uk/children/story/0,1074,1121332,00.html>).

81. *Id.*; Leary, *supra* note 44, at 520-21.

82. See Kyle Duncan, *Child Pornography and First Amendment Standards*, 76 MISS. L.J. 677, 679-686 (2007) (discussing the Supreme Court’s First Amendment exceptions).

83. *Miller v. California*, 413 U.S. 15, 23 (1973).

84. *Id.* at 24 (stating that the image must “appeal to the prurient interest in sex . . . in a patently offensive way . . . and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value”).

85. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

The Supreme Court first tackled child pornography laws in *New York v. Ferber*.<sup>86</sup> In *Ferber*, the Court held that the First Amendment did not protect child pornography.<sup>87</sup> Two decades after *Ferber*, in *Ashcroft v. Free Speech Coalition*, the Court held that “virtual” child pornography and pornography involving actors who look like minors is constitutionally protected because it “records no crime and creates no victims by its production.”<sup>88</sup> The Court also reiterated the need for child pornography statutes in both *Ferber* and *Free Speech Coalition*.<sup>89</sup>

In *Free Speech Coalition*, the Court stated that “*Ferber* upheld a prohibition on the distribution and sale of child pornography” because it was “a permanent record of a child’s abuse” and “each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.”<sup>90</sup> Additionally, the Court noted that “the State had an interest in closing the distribution network” in order to “dry up the market for this material.”<sup>91</sup> Distinguishing the two cases, the Court stated that *Ferber* had refused to afford child pornography First Amendment protection not because of the content of the communication, but because of how it was created.<sup>92</sup> Additionally, the Court rejected the government’s argument that this material could be banned because it “whets the appetite of pedophiles and encourages them to engage in illegal conduct.”<sup>93</sup> The Court reiterated that legislatures could not base statutes on the appeal of banning certain thoughts<sup>94</sup> and that child pornography laws lie outside the scope of First Amendment protection because of the recorded crime and harm to the victim.<sup>95</sup>

### B. Minors Producing Pornography

Although sexting is a new legal phenomenon,<sup>96</sup> at least two academics have addressed the value, if any, of charging juveniles with child pornography crimes prior to the term gaining widespread use.<sup>97</sup> Those advocating a “therapeutic approach”<sup>98</sup> acknowledge that state child pornography laws “apply to any pornographic depictions of a minor” and “do not exempt cases where minors

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86. 458 U.S. 747 (1982).

87. *Id.* at 764.

88. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002).

89. *Id.* at 244-45; *Ferber*, 458 U.S. at 756-57.

90. *Free Speech Coal.*, 535 U.S. at 249.

91. *Id.* at 252.

92. *Id.* at 251-52.

93. *Id.* at 253.

94. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 577, 566 (1969)).

95. See Smith, *supra* note 14, at 518-21 (discussing the Supreme Court’s reasoning for upholding child pornography laws that cause visual harm and criminal acts).

96. Richards & Calvert, *supra* note 5, at 1-4.

97. Compare Leary, *supra* note 14, with Smith, *supra* note 14.

98. Smith, *supra* note 14, at 541.

produce or disseminate pornographic images of themselves.<sup>99</sup> The laws are often separated into “creation,”<sup>100</sup> “possession,”<sup>101</sup> and “distribution”<sup>102</sup> categories.<sup>103</sup> These statutes prohibit material involving minors that is obscene<sup>104</sup> or depicts sexual conduct,<sup>105</sup> abuse,<sup>106</sup> nudity,<sup>107</sup> or child pornography.<sup>108</sup> The statutory

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99. *Id.* at 513.

100. *See, e.g.,* GA. CODE ANN. § 16-12-100(b)(1) (2010) (“It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.”).

101. *See, e.g., id.* § 100(b)(8) (“It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.”).

102. *See, e.g., id.* § 100(b)(6) (“It is unlawful for any person knowingly to advertise, sell, purchase, barter, or exchange any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct can be found or purchased.”).

103. Shannon Shafron-Perez, Comment, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 434 (2009).

104. *See, e.g.,* ALA. CODE § 13A-12-197 (2006 & Supp. 2010). This portion of the Alabama Code provides that

[a]ny person who knowingly films, prints, records, photographs or otherwise produces any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class A felony.

105. *See, e.g.,* IND. CODE § 35-42-4-4(c) (2010). This section of the Indiana Code provides that

[a] person who knowingly or intentionally possesses: (1) a picture; (2) a drawing; (3) a photograph; (4) a negative image; (5) undeveloped film; (6) a motion picture; (7) a videotape; (8) a digitized image; or (9) any pictorial representation; that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

106. *See, e.g.,* MICH. COMP. LAWS ANN. § 750.145c(m) (West, Westlaw through 2010 legislation). This section of the Michigan Code defines “child sexually abusive material” as any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated

language may differ slightly,<sup>109</sup> but it still encompasses “self-produced child pornography.”<sup>110</sup> Conviction under child pornography statutes carries severe penalties.<sup>111</sup> Creating, distributing, and possessing child pornography may result in jail time and may also require registration on the applicable state sex offender registry, a penalty that could potentially prevent future rehabilitation.<sup>112</sup>

Over the past several years, prosecutors have more frequently focused their efforts on offenders who are minors when handling child pornography cases.<sup>113</sup> “Self-exploitation” images of children appeared online more frequently with the advent of computer cameras.<sup>114</sup> Similarly, state laws have subjected teens to penalties for sending pornographic videos of themselves to other people. For example, the language of Florida’s pornography laws is neither unique nor varied compared to other states.<sup>115</sup> In *A.H. v. State*,<sup>116</sup> a case extensively discussed in recent articles addressing sexting,<sup>117</sup> a sixteen-year-old girl and her seventeen-

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image, or picture, other visual or print or printable medium, or sound recording.

107. See, e.g., OHIO REV. CODE ANN. § 2907.323(A)(1) (West, Westlaw through 2010 legislation) (“No person shall . . . [p]hotograph any minor who is not the person’s child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity . . .”).

108. See, e.g., OKLA. STAT. ANN. tit. 21, § 1021(A)(3) (West, Westlaw through 2010 legislation) (“Every person who willfully and knowingly either . . . [w]rites, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, knowingly downloads on a computer, or exhibits any obscene material or child pornography . . .”).

109. Shafron-Perez, *supra* note 103, at 434.

110. Smith, *supra* note 14, at 512-13 (acknowledging that Professor Leary’s article, *supra* note 14, correctly points out that minors in a “cell phone porn” case had violated child pornography laws).

111. *Id.* at 508.

112. *Id.* at 536-37; see also W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge with an “Aggravating Factors” Framework*, 77 TENN. L. REV. 1, 28-29 (2009) (agreeing with Professor Smith’s assessment of the issue).

113. Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299, 301-02 (2010).

114. See Leary, *supra* note 14, at 18-19.

115. FLA. STAT. ANN. § 827.071 (West, Westlaw through 2010 legislation) (“A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance”); see also Weins & Hiestand, *supra* note 112, at 4.

116. 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

117. See Arcabascio, *supra* note 49, at 15-19; Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 49 (2009); John A. Humbach, ‘Sexting’ and the First Amendment, 37 HASTINGS CONST. L.Q. 433, 433-34 (2010); Kimpel, *supra* note 113, at

year-old boyfriend faced child pornography charges because they created digital photos of themselves nude and engaged in sexual behavior.<sup>118</sup> The court held that the state had a compelling interest “in preventing the production of these photographs and criminal prosecution was the least intrusive means of furthering the [s]tate’s compelling interest.”<sup>119</sup> Furthermore, the court stated that the distribution of the photographs eliminated the minors’ reasonable expectation of privacy.<sup>120</sup> A decade earlier, another Florida appellate court held that the state’s compelling interest in protecting minors was different when two minors had consented to sexual intercourse.<sup>121</sup> In that case, *State v. A.R.S.*, the fifteen-year-old male minor had created, possessed, and shown to a third person a sexually explicit videotape of himself and a female minor.<sup>122</sup> The court reversed the trial court’s dismissal of the charges and reasoned that the statute’s purpose was “to protect minors from exploitation from anyone,” including other minors.<sup>123</sup>

Legislative policy has relied heavily on stereotypes when addressing how to handle sex offenders.<sup>124</sup> This practice has created legislative constructions utilizing broad terms that encompass a wide variety of conduct.<sup>125</sup> The stereotypes and broad language also reinforce the notion that states should punish a juvenile sex offender under the same rationale as an adult offender, even if empirical or scientific evidence does not support similar types of punishments.<sup>126</sup>

### C. Addressing Age of Consent and Child Pornography Laws

As illustrated, prosecutors have generally not extended the rationale that because “two teenagers of comparable age [may] engage in an act of voluntary sexual intercourse,”<sup>127</sup> they can therefore legally record, photograph, or visually

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300; Leary, *supra* note 14, at 4; Smith, *supra* note 14, at 513 n.32; Weins & Hiestand, *supra* 112, at 4-5; Wood, *supra* note 7, at 170; Jesse Michael Nix, Study Note, *Unwholesome Activities in a Wholesome Place: Utah Teens Creating Pornography and the Establishment of Prosecutorial Guidelines*, 11 J.L. & FAM. STUD. 183, 188-89 (2008); Sarah Wastler, Student Article, *The Harm in “Sexting”? Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images*, 33 HARV. J.L. & GENDER 687, 694-95 (2010).

118. *A.H.*, So. 2d at 235.

119. *Id.*

120. *Id.* at 237; *see also* Weins & Hiestand, *supra* note 112, at 4-5.

121. *State v. A.R.S.*, 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996).

122. *Id.* at 1384.

123. *Id.* at 1387 (citing *Schmitt v. State*, 590 So. 2d 404, 412 (Fla. 1991)).

124. ZIMRING, *supra* note 44, at xiii.

125. *See id.* at 11-13 (discussing juvenile state statutes that closely parallel adult statutes and statutes worded broadly that capture unintended conduct).

126. *See id.* at xiii; *cf. Smith*, *supra* note 14, at 514-15 (discussing severe punishments minors may face if prosecuted under child pornography statutes).

127. Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 390 (2003).

document it.<sup>128</sup> Federal law makes it illegal for anyone to send depictions of any person under the age of eighteen engaged in sexual acts “across state lines.”<sup>129</sup> Seemingly, the United States Code makes child pornography statutes applicable to legally consenting teens who document their sexual activities.<sup>130</sup>

At least one state court, however, has reached a different decision when faced with an age of consent law that is inconsistent with the definition of a minor or child in its child pornography laws. In Indiana, one defense to sexual misconduct with a minor is if the accused believed that the individual was at least sixteen years old.<sup>131</sup> The statute prohibiting the provision of obscene matter or child pornography to minors through electronic means, however, defines a child as less than eighteen years old.<sup>132</sup> The Indiana Court of Appeals addressed this dichotomy in *Salter v. State*, a case in which an adult male defendant sent “pictures of his genitals” to a sixteen-year-old female minor who had sent him thirty-eight images of herself in various stages of nudity.<sup>133</sup> The court held that the “dissemination of matter harmful to minors” statute was too vague because it did not afford the defendant fair notice that the images would be harmful to a sixteen-year-old minor when read in light of the age of consent law.<sup>134</sup>

Similarly, in Pennsylvania, the age of consent is sixteen,<sup>135</sup> but the state still defines a child as anyone under the age of eighteen.<sup>136</sup> In *Commonwealth v. Kitchen*, the trial court convicted an adult male under Pennsylvania’s child pornography laws and sentenced him to serve two to five years for each count of taking and possessing nude photographs of his sixteen-year-old girlfriend.<sup>137</sup> The defendant argued that because he and the victim had legally lived together for eighteen months and had a child together, the application of the child

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128. *Contra Smith*, *supra* note 14, at 524-25; Weins & Hiestand, *supra* note 112, at 50 n.345.

129. Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 380 (2009) (citing 18 U.S.C. § 2252 (2006 & Supp. 2008)).

130. *Id.*

131. IND. CODE § 35-42-4-9(c) (2008).

132. *Id.* § 35-49-3-3(b)(3).

133. *Salter v. State*, 906 N.E.2d 212, 214, 221 (Ind. Ct. App. 2009). The court found that because “Indiana’s possession of child pornography statute only extends to children under sixteen,” the defendant could not be found guilty of possession of child pornography. *Id.* at 221. This case example illustrates the problem of interpreting age of consent laws that conflict with child pornography laws, but it does not stand for the proposition that penalties should be lessened when an adult is involved. *See, e.g.*, Leary, *supra* note 14, at 507 (stating that adults involved in producing images of minors “is an example grooming the child for sexual exploitation at a minimum”).

134. *Salter*, 906 N.E.2d at 223.

135. 18 PA. CONS. STAT. ANN. § 3122.1 (West, Westlaw through 2010 legislation).

136. *Id.* § 6312.

137. *Commonwealth v. Kitchen*, 814 A.2d 209, 211 (Pa. Super. Ct. 2002), *aff’d*, 839 A.2d 184 (Pa. 2003); *see also* Leary, *supra* note 44, at 546 n.253 (discussing case for support that “children do not have the ability to consent to being exploited”).

pornography law to any minor under eighteen was overbroad and should not apply.<sup>138</sup> Nevertheless, the Pennsylvania Superior Court disagreed, holding that the legislature had “determined that children need to be protected from being victimized through child pornography” and affirmed the defendant’s judgment of sentence.<sup>139</sup>

### III. SEXTING

The advance of technology, and especially the proliferation of cell phones and text messaging, has changed the way individuals interact, date, and court.<sup>140</sup> Cameras on cell phones have greatly increased the ability for individuals to take pictures, including explicit ones.<sup>141</sup> In the last half-decade, cell phone ownership in the adolescent population has skyrocketed. Between 2004 and 2009, the number of twelve-year-old children owning cell phones jumped from eighteen percent to fifty-eight percent.<sup>142</sup> Furthermore, sixty-six percent of teens that own cell phones send text messages.<sup>143</sup> Among juveniles, surveys indicate that somewhere between four<sup>144</sup> and twenty<sup>145</sup> percent of adolescents have sent sexually suggestive images via cell phone.

Polls show that teenage recipients of sext messages usually get these messages from people they know.<sup>146</sup> Generally, sexting occurs in three situations.<sup>147</sup> First, sexting can occur between “two romantic partners.”<sup>148</sup> Second, images of the first scenario may be distributed to persons not in the relationship.<sup>149</sup> Third, teenagers may exchange images as a form of flirtation or in hopes of beginning a relationship.<sup>150</sup> Within each of these scenarios is a wide spectrum of possible behavior ranging from sending images as a joke to demanding images as a form of peer pressure or worse.<sup>151</sup>

Adults often enter the situation when a school administrator, teacher, or adult

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138. *Id.* at 212.

139. *Id.* at 214.

140. David Brooks, *Cell Phones, Texts and Lovers*, N.Y. TIMES, Nov. 3, 2009, at A29, available at 2009 WLNR 21915638.

141. Leary, *supra* note 14, at 24; see also Arcabascio, *supra* note 49, at 6-7.

142. AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND SEXTING 2 (2009), available at <http://pewresearch.org/assets/pdf/teens-and-sexting.pdf>.

143. *Id.*

144. *Id.* at 4.

145. NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *supra* note 7, at 1.

146. See LENHART, *supra* note 142, at 2 (stating that fifteen percent of teens have received such images from someone they know).

147. *Id.* at 6-8.

148. *Id.* at 6.

149. *Id.* at 7.

150. *Id.*

151. *Id.*

guardian or supervisor discovers the images.<sup>152</sup> School administrators may be required to report the images to authorities under possession of child pornography statutes if they confiscate any phone or image.<sup>153</sup> Once the image is confiscated, the issue becomes who to punish. Some parents push to have other participants in the images punished<sup>154</sup> along with those who distribute the images.<sup>155</sup> Teenagers may find that their pictures quickly spread throughout the school population, and they may face relentless ridicule from their peers.<sup>156</sup> In the past two years, stories of teens sending such “explicit text messages . . . created a media frenzy, parental panic, and ultimately a moral conundrum for the educational system and the courts.”<sup>157</sup>

In response to the media uproar, schools have attempted to create policies prohibiting sexting.<sup>158</sup> Some of these schools, however, have no procedures in place to discipline students who are caught sexting.<sup>159</sup> Therefore, they may simply resort to contacting local law enforcement to address incidents.<sup>160</sup> Schools with sexting policies may also suspend or expel students<sup>161</sup> and contact law enforcement due to concern that the image is child pornography.<sup>162</sup>

Once law enforcement is involved in a sexting situation, prosecutors have been known to take or threaten legal action against teens for transmitting explicit images of themselves.<sup>163</sup> As with school procedures, many states prosecuting

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152. See, e.g., Kathleen Kennedy Manzo, *Administrators Confront Student ‘Sexting’: Schools Urged to Develop Policies and Programs to Curb the Practice*, EDUC. WK., June 17, 2009, at 8, available at 2009 WLNR 12479375; Meacham, *supra* note 1, at 1A.

153. See Ting-Yi Oei, *My Students. My Cellphone. My Ordeal.*, WASH. POST, Apr. 19, 2009, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702663.html> (recounting incident where school principal faced potential charges for not alerting law enforcement after finding image on cell phone and temporarily storing it on his cell phone).

154. See Heck, *supra* note 4, at 29.

155. Mary McCarty, *Grieving Parents Want Appropriate Sexting Penalty*, DAYTON DAILY NEWS, Apr. 26, 2009, at A8, available at 2009 WLNR 8089092.

156. See *id.* (reporting on an Ohio eighteen-year-old who committed suicide after weeks of being tormented by other students when a nude picture of her circulated throughout her high school).

157. Sara Jacobson, *The Ramifications of Criminalizing Teen Sexting*, UPON FURTHER REVIEW (Phila. Bar Ass’n, Phila., Pa.), July 7, 2009 (on file with author).

158. Manzo, *supra* note 152.

159. *Id.*

160. *Id.*

161. *Id.*

162. Andrea Billups, *School Districts Hope Students Get the Picture About ‘Sexting’ Dangers*, WASH. TIMES, July 23, 2009, at A1, available at 2009 WLNR 14048151 (discussing Florida school district’s warning that students may be suspended from school and arrested under child pornography laws).

163. Jennifer Golson, *A Debate Swirls over Teens’ Lurid Pictures: Should Self-Portraits Draw Harsh Penalties?*, STAR-LEDGER, March 29, 2009, at 1, available at 2009 WLNR 5911079.

teens still do not have laws to address teens who privately send photographs to one another<sup>164</sup> or are still in the process of developing statutory language.<sup>165</sup> Judges struggle with how the punishment found in child pornography laws fits what justice requires.<sup>166</sup> Rationales for prosecutorial intervention of teens creating self-exploitation images of themselves include harm to children in images,<sup>167</sup> harm to children not in images,<sup>168</sup> harm to society and children generally,<sup>169</sup> and deterrence against future sexting.<sup>170</sup> Specifically, in instances of further distribution, intervention is warranted because harm in the form of “emotional distress and humiliation” results when the images are sent to those who were never intended to see them.<sup>171</sup>

#### A. *Sexting Charges*

Recent law enforcement cases addressing sext messages have varied considerably in their approaches. This variation is largely because teens caught sexting rarely fit a specific profile.<sup>172</sup> In addition, punishments differ across jurisdictions and do not necessarily correlate with the teens’ culpability or any intent they exhibited.

In one of the most publicized sexting cases, a Pennsylvania district court prevented a prosecutor from pursuing charges against three teenage girls for possessing or distributing child pornography.<sup>173</sup> The school discovered photographs on cell phones of the girls depicting them as “scantly clad, semi-nude, and nude.”<sup>174</sup> The prosecutor insisted that this was child pornography<sup>175</sup>

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164. *Id.*; see also NAT’L CONFERENCE OF STATE LEGISLATURES, 2010 LEGISLATION RELATED TO “SEXTING” [hereinafter 2010 LEGISLATION], <http://www.ncsl.org/default.aspx?TabId=19696> (last visited July 26, 2010); NAT’L CONFERENCE OF STATE LEGISLATURES, 2009 “SEXTING” LEGISLATION [hereinafter 2009 LEGISLATION], <http://www.ncsl.org/default.aspx?tabid=17756> (last visited July 26, 2010).

165. See 2010 LEGISLATION, *supra* note 164.

166. Robin Fretwell Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127, 1162-63 n.197 (2009).

167. Leary, *supra* note 14, at 9-11; see also Nix, *supra* note 117, at 184-85.

168. Leary, *supra* note 14, at 12-17.

169. *Id.* at 17-18.

170. Leary, *supra* note 14, at 42-43; Weins & Hiestand, *supra* note 112, at 29; see also Golson, *supra* note 163.

171. Calvert, *supra* note 117, at 62.

172. *Id.* at 61.

173. Miller v. Skumanick, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009), *aff’d sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

174. *Id.* at 637.

175. Two of the girls wore bras as one made a peace sign with her hand and another spoke on the phone. *Id.* at 639. The other girl was photographed with a “towel . . . wrapped around her body, just below her breasts.” *Id.*

“because the girls were posed ‘provocatively.’”<sup>176</sup> He also gave the girls’ parents an ultimatum directing the girls either to attend his education program designed to teach “what it means to be a girl in today’s society” or face charges.<sup>177</sup> The court held that the girls and their parents had “asserted constitutionally protected activity”<sup>178</sup> with sufficient likelihood to succeed on the merits and issued a temporary restraining order enjoining the prosecutor from pursuing sexting charges against the minors.<sup>179</sup> The court, however, did not address whether the state’s child pornography statute applied.<sup>180</sup> The parents argued that the statute was inapplicable because the minors were the subjects of the photographs and the “victims of the crime.”<sup>181</sup> In response to the prosecutor’s appeal, the Third Circuit Court of Appeals affirmed the grant of preliminary injunction<sup>182</sup> and stated that because the prosecutor was requiring a minor to state why her actions were morally wrong, as opposed to legally wrong, she would likely prevail on “her First Amendment freedom against compelled speech” argument.<sup>183</sup>

Charges would not have been unprecedented. Prior to *Miller v. Skumanick*, six Pennsylvania students faced charges for possession, manufacture, and distribution of child pornography.<sup>184</sup> Three male students faced possession charges after school officials found “racy” pictures of three girls on a cell phone; the three girls were also charged.<sup>185</sup> Each student pled to misdemeanor charges in juvenile court.<sup>186</sup> By pleading, the students likely avoided more serious charges that could have resulted if they had been prosecuted in adult court.

Sexting has resulted in threatened jail time when an adult was involved in two other states. In Oregon, a sixteen-year-old female took sexually explicit video of another female minor with the encouragement of a thirty-one year-old adult male.<sup>187</sup> The juvenile defendant had shown the video to others.<sup>188</sup> Through a plea

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176. *Id.*

177. *Id.* at 638-40.

178. *Id.* at 644. The plaintiffs filed a complaint for “violation of plaintiffs’ First Amendment right to free expression . . . contend[ing] that the photographs in question [were] not in violation of any obscenity law.” *Id.* at 640. The plaintiffs also alleged that their “First Amendment right to be free from compelled expression” and the parents’ “Fourteenth Amendment substantive due process right as parents to direct their children’s upbringing” had been violated. *Id.*

179. *Id.* at 644, 647.

180. *Id.* at 645-46. The court noted that even if the depictions were “prohibited sexual acts,” the plaintiffs were reasonably likely to succeed on the merits because there was no evidence the teens had disseminated the images. *Id.*

181. *Id.* at 645.

182. *Miller v. Mitchell*, 598 F.3d 139, 155 (3d Cir. 2010).

183. *Id.* at 152.

184. Paula Reed Ward, *DA’s Case over Teen ‘Sexting’ Draws Ire of Parents*, PITTSBURGH POST-GAZETTE, MARCH 26, 2009, AT A1, available at 2009 WLNR 5651200.

185. *Id.*

186. *Id.*

187. Tobias, *supra* note 16.

188. *Id.*

deal, the sixteen-year-old served two months in a state prison, received counseling, and did not have to register as a sex offender.<sup>189</sup> In Vermont, the court allowed an eighteen-year-old high school student to plead guilty to lesser charges after asking “two teenage girls” to “perform[ ] sex acts and send him the results.”<sup>190</sup> The lesser charges entailed a “five-year deferred sentence.”<sup>191</sup>

Two instances in Wisconsin illustrate a more pernicious situation: minors engaged in predatory conduct.<sup>192</sup> In February 2009, a high school student “was accused . . . of using the Facebook [website] to coerce male schoolmates into sexual encounters” after deceiving over thirty male classmates into sending nude pictures of themselves to him by posing online as a female classmate.<sup>193</sup> The then-eighteen-year-old student threatened to distribute the pictures if his classmates did not perform sex acts with him.<sup>194</sup> The court sentenced him to prison for fifteen years.<sup>195</sup> In another Wisconsin case, a fourteen-year-old high school student threatened at least seven girls into sending him explicit photos of themselves.<sup>196</sup> This was only several months after he was adjudicated for “second-degree sexual assault of a child.”<sup>197</sup> The school expelled the boy, and he faced charges in the children’s court.<sup>198</sup>

### B. State Legislative Responses to Sexting

In 2009, twelve states introduced or passed legislation addressing sexting.<sup>199</sup> As of September 2010, sixteen states had either “introduced or [were] considering” sexting bills.<sup>200</sup> The proposals and enacted laws have been

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189. *Id.*

190. John Curran, *Vt. Teen Pleads in Sex Case*, THE TIMES, Sept. 4, 2009, at A11, available at 2009 WLNR 17378056. The plea deal was in response to action from the Vermont legislature to prevent felony charges from being sought against minors in sexting cases. *Id.*

191. *Id.*

192. Leary, *supra* note 44, at 541.

193. Tom Kertscher, *Whitnall Student Accused of Coercing Girls to Send Nude Photos Has Prior Record*, MILWAUKEE JOURNAL SENTINEL, Oct. 14, 2009, available at 2009 WLNR 20301834.

194. Susan Saulny, *Sex Predator Accusations Shake a Wisconsin Town*, N.Y. TIMES (Nov. 1, 2009), <http://www.nytimes.com/2009/02/11/world/americas/11iht-11wisconsin.20101124.html>.

195. Laurel Walker, *New Berlin Teen Gets 15-Year Prison Term in ‘Sexting’ Case: Stancl Posed as Girl, Tricked Victims into Sex*, MILWAUKEE JOURNAL SENTINEL, Feb. 25, 2010, at 1, available at 2010 WLNR 3949470.

196. Kertscher, *supra* note 193.

197. *Id.*

198. *Id.*

199. 2009 LEGISLATION, *supra* note 164.

200. 2010 LEGISLATION, *supra* note 164.

questioned,<sup>201</sup> criticized,<sup>202</sup> and applauded.<sup>203</sup>

Initially, several legislators proposed steps that focused more on age than conduct by suggesting age gap provisions.<sup>204</sup> An age gap provision provides a window in which two minors relatively close in age will avoid criminal charges or else face “substantially reduced” punishment.<sup>205</sup> In a proposed Pennsylvania bill, “no person under [eighteen]” could transmit images depicting nudity to another person four years younger or older than the person transmitting or distributing the image.<sup>206</sup> Minors who transmit nude images outside the age gap provisions could otherwise have been adjudicated in an alternative program and ordered to attend “an educational program.”<sup>207</sup> Similarly, Vermont’s legislature proposed a bill in 2009 that included an age gap provision.<sup>208</sup> Ultimately, however, most states, including Vermont,<sup>209</sup> have chosen not to follow the age gap path. Absent a deterrent force within the legislation, state governments are likely concerned that the number of sexting juveniles, as well as the number of images created, would increase.<sup>210</sup>

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201. See Calvert, *supra* note 117, at 58-60 (questioning whether laws addressing sexting can be enforced in a fair way and suggesting other applicable laws); Wood, *supra* note 7, at 164-65 (applauding Indiana for simply creating a study commission to look into just responses to sexting).

202. See Arcabascio, *supra* note 49, at 31-40 (critiquing Vermont, Nebraska, and North Dakota responses to sexting and advocating that states incorporate age gap provisions to include eighteen-year-old high school students in sexting legislation); Nix, *supra* note 117, at 190-92 (criticizing a Utah bill that focused on age distinctions rather than conduct distinctions); Weins & Hiestand, *supra* note 112, at 33-48 (discussing Vermont, Nebraska, Utah, and Ohio legislative responses to sexting and finding inequities in applying them to a variety of situations).

203. See Arcabascio, *supra* note 49, at 32 (finding that “[t]he most important aspect of the [Vermont] law [was] that it remove[d] the criminal behavior from the grasp of pornography-type statutes and thereby avoid[ed] the requirement of registration on the state’s sex offender list”).

204. See S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009) (stating that no person under the age of eighteen could transmit an explicit image by computer or telecommunications device to another minor “who is not more than four years younger or more than four years older”); S.B. 125, 2009 Leg., Reg. Sess. (Vt. 2009); see also Nix, *supra* note 117, at 190-92 (criticizing one approach in Utah that would only account for age differences but not differences in conduct); Weins & Hiestand, *supra* note 112, at 34-37 (discussing Vermont’s original bill).

205. Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 706 (2006).

206. S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

207. *Id.*

208. S.B. 125, 2009 Leg., Reg. Sess. (Vt. 2009); see also Calvert, *supra* note 117, at 57-58 (discussing Vermont bill that exempted “13- to 18-year-olds” from child pornography prosecution); Leary, *supra* note 44, at 555-57 (discussing the evolution of Vermont’s response to sexting).

209. See VT. STAT. ANN. tit. 13, § 2802b(b)(1) (2010) (“a minor who violates subsection (a) of this section shall be adjudicated delinquent”).

210. See Mary Graw Leary, *The Right and Wrong Responses to “Sexting”*, WITHERSPOON INST. (May 12, 2009), <http://www.thepublicdiscourse.com/2009/05/227> (arguing that the images will be obtained by pedophiles and provide a “built-in defense” that they were legally obtained).

As of September 2010, four states have passed laws that specifically address sexting.<sup>211</sup> These states—Arizona,<sup>212</sup> Connecticut,<sup>213</sup> Illinois,<sup>214</sup> and Louisiana<sup>215</sup>—punish any first-time sexting offense, but they do so in slightly different ways. Louisiana's statute takes a different approach to age and governs minors sixteen and under.<sup>216</sup> In contrast, Illinois<sup>217</sup> and Arizona<sup>218</sup> statutes govern minors seventeen and under. Connecticut's law reduces the child pornography penalty for minors between the ages of thirteen and seventeen years old when they possess images of minors between the ages of thirteen and fifteen years old that were knowingly and voluntarily transmitted.<sup>219</sup> The largest differences may come from how each state handles a sexting incident. For example, Arizona provides a defense if the minor did not ask for the image, attempted to destroy or delete it or reported it to a parent or school official, and did not further distribute it.<sup>220</sup> In contrast, Louisiana law makes it an offense if the minor distributed an image of themselves, but it permits courts to “imprison[]” minors for up to ten days if they possess or distribute an image of another.<sup>221</sup> Each statute, though, increases punishment if the minors engage in additional conduct other than simply possessing a sexually explicit image of a minor.<sup>222</sup>

Other states have also provided teens with defenses or lessened the penalties for sexting. Nebraska's signed bill provides a defense for minors in possession of sexually explicit images of one other child, age fifteen or older, not taken through coercion, and not further distributed.<sup>223</sup> Utah,<sup>224</sup> Ohio,<sup>225</sup> and New Jersey<sup>226</sup> have proposed or signed bills that either make a sexting offense a

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211. See 2010 LEGISLATION, *supra* note 164.

212. ARIZ. REV. STAT. ANN. § 8-309 (2010).

213. H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010).

214. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

215. H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010).

216. *Id.*

217. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

218. ARIZ. REV. STAT. ANN. §§ 8-201, 8-309 (2010).

219. H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010).

220. ARIZ. REV. STAT. ANN. § 8-309(C) (2010).

221. See H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010) (containing provision to suspend the sentence if the court allows the juvenile to perform eighty hours of community service).

222. See e.g., ARIZ. REV. STAT. ANN. § 8-309(D) (2010) (deeming it a Class 3 misdemeanor if a minor distributes an image received to a third party); H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010) (requiring a voluntary act to have been committed in order to be classified as “sexting”); H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010); H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010) (requiring a voluntary act as well as increasing the penalty for additional offenses).

223. NEB. REV. STAT. §§ 28-813.01, -1463.03, -1463.05 (Supp. 2009); see also Arcabascio, *supra* note 49, at 36-39 (discussing Nebraska statute).

224. UTAH CODE ANN. §§ 76-10-1204, -1206 (West, Westlaw through 2010 legislation); see also Calvert, *supra* note 117, at 58 (discussing Utah law).

225. H.R. 473, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

226. Assemb. B. 1561, 214th Leg., 1st Ann. Sess. (N.J. 2010)); see also S.B. 2926, 213th Leg.,

misdemeanor or create a diversionary program for minors. In Florida, a house bill has been proposed that makes the first violation “noncriminal” and requires payment of a twenty-five dollar fine and community service.<sup>227</sup> The bill, however, does not exclude a minor from being prosecuted under “the depiction of sexual conduct or sexual excitement, and [it] does not prohibit the prosecution of a minor for stalking;” furthermore, it punishes juveniles with misdemeanor and felony penalties for subsequent offenses.<sup>228</sup> States have varied in the options left available to prosecutors; some states allow prosecutors to choose whether the sexting or child pornography statute should apply.<sup>229</sup>

Additionally, some proposed bills offer educational programs for minors before they encounter trouble.<sup>230</sup> A New Jersey bill would have required retail stores selling cell phones to include informational brochures describing the dangers of sexting.<sup>231</sup> A New York bill would have created an educational program through the New York State Office of Children and Family Services in order to promote awareness of publicly posting or distributing “provocative” depictions of themselves.<sup>232</sup>

Finally, several other states are still questioning whether legislation can effectively address sexting. After contemplating new sexting legislation, these states have decided not to take any action.<sup>233</sup> In Missouri, a provision that would have completely barred juvenile sexting was dropped from a crime bill.<sup>234</sup> Among the legislators’ likely concerns is that sexting is simply a fad that will fade away but leave needless statutory language behind.<sup>235</sup> Others have expressed concern that if sexting is truly a widespread problem, it will not be possible to enforce punishments effectively.<sup>236</sup> It is less likely that laws will be followed or

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2d Ann. Sess. (N.J. 2009) (identical state senate bill).

227. H.R. 1335, 2010 Leg., 112th Reg. Sess. (Fla. 2010).

228. *Id.*

229. See Weins & Hiestand, *supra* note 112, at 47-48 (discussing legislative differences among Nebraska, Ohio, Utah, and Vermont statutory schemes).

230. Assemb. B. 8622, 223d Leg., Reg. Sess. (N.Y. 2010); Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

231. Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

232. See Assemb. B. 8622, 223d Leg., Reg. Sess. (N.Y. 2010).

233. Tom Fahey, *Ad Hoc Panel: ‘Sexting’ Does Not Warrant Legislation*, UNION LEADER, Sept. 10, 2009, at 8; *Missouri General Assembly: What Passed, What Failed*, COLUMBIA DAILY TRIB. (May 16, 2009), <http://www.columbiatribune.com/news/2009/may/16/missouri-general-assembly-what-passed-what-failed/>.

234. *Missouri General Assembly: What Passed, What Failed*, *supra* note 233.

235. See Don Corbett, *Let’s Talk about Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of “Sexting,”* 13 No. 6 J. INTERNET L. 3, 8 (2009) (suggesting that sexting will go the way of “acid-washed jeans, big hair, and Nintendo”).

236. See Arcabascio, *supra* note 49, at 41 (acknowledging the deterrent effect of charging juveniles with crimes but arguing that they may be more deterred by punishment from parents or “disapproval from their friends”); Calvert, *supra* note 117, at 59-60 (discussing the problem of enforcing sexting laws and their potential difficulty in being a suitable deterrent tool against

justly imposed on the few caught if the laws cannot be effectively enforced.<sup>237</sup> Yet regardless of whether sexting diminishes or laws are somewhat more difficult to enforce, the legal and social responses to sexting must be forward-looking and address potentially unjust consequences.<sup>238</sup>

#### IV. PROPOSAL: ADHERING TO RATIONALES EMPLOYED BY JUVENILE COURTS

Based on the totality of the circumstances, states should pass legislation addressing the excessive penalties and consequences against teens caught sexting.<sup>239</sup> Unchanged statutes represent rationales that “focus on preventing pedophiles and sexual abusers from stimulating their appetites, protecting children, and encouraging the elimination of existing contraband.”<sup>240</sup> Although any move to address minors’ sexual activity “stumbles into a host of related issues that complicate an already difficult subject,”<sup>241</sup> states should amend their laws to address recent changes in technology and juvenile conduct.<sup>242</sup>

##### *A. Distinguish Between Intent and Actions of Minors*

Preventing minors from initially creating and distributing sexually explicit images should be the ultimate goal of any piece of sexting legislation because it reduces the scale of the issue.<sup>243</sup> In pursuit of this goal, however, legislatures should consider the role rehabilitation has played in juvenile law.<sup>244</sup>

Although much more research of juvenile sex offenders<sup>245</sup> and how they compare to sexting teenagers is needed to reach any firm conclusions,<sup>246</sup> initial surveys on sexting suggest that a majority of incidents result from a lack of maturity and judgment,<sup>247</sup> not malicious intent. For example, none of the Pew

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sexting).

237. See Calvert, *supra* note 117, at 59-60 (discussing the limited situations in which prosecutions may be brought).

238. *Id.* at 60-61.

239. Cf. Leary, *supra* note 44, at 510-11 (arguing that teens caught sexting should be adjudicated in juvenile court if prosecution is necessary because it will permit rehabilitation).

240. Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 BERKELEY TECH. L.J. 1227, 1238 (2004).

241. Phipps, *supra* note 127, at 374.

242. But see Calvert, *supra* note 117, at 7 (arguing that it is too early to answer the question of how society should address sexting).

243. See *id.* at 29; Leary, *supra* note 14, at 42-43.

244. See, e.g., Leary, *supra* note 44, at 551 (advocating for structured prosecutorial discretion with adjudications in juvenile court focusing on rehabilitation); Weins & Hiestand, *supra* note 112, at 29 (advocating a juvenile court response that aims to rehabilitate teenagers who sext).

245. See ZIMRING, *supra* note 44, at 117-18 (arguing for more research of juvenile sex offenders in general).

246. See Humbach, *supra* note 117, at 435, 482 n.258.

247. See Calvert, *supra* note 117, at 29-30 (discussing different understandings of sexting

Research Center's categories of typical sexting include teens actively looking to exploit other teens.<sup>248</sup> Instead, a number of students view sexting as a substitute for sexual activity.<sup>249</sup> Additionally, teens appear more likely to engage in sexting as they mature.<sup>250</sup> Many teens view sexting as having potentially harmful consequences, but they appear more concerned with getting in trouble at school than with punishment by law enforcement.<sup>251</sup> Another survey showed that ninety percent of teens "somewhat" or "strongly" agreed that it was "dangerous to send" the images, but only fifty-five percent acknowledged the likelihood of legal consequences.<sup>252</sup> The same survey also found that sexting teens most often send these messages because someone asked them to or to have fun.<sup>253</sup> As stated above, objective evidence indicates that teens are less likely than adults to understand the risks they are taking.<sup>254</sup>

Over time, the juvenile justice system's chief goal may have shifted toward punishment and away from its initial goal of rehabilitation.<sup>255</sup> However, the core idea of rehabilitation remains.<sup>256</sup> If the purpose of child pornography laws is to punish those who victimize persons depicted in the images,<sup>257</sup> the same justification does not apply to a sexting image voluntarily<sup>258</sup> sent between a teenage couple close in age.<sup>259</sup> In that situation, it is less likely that exploitation occurred or commercial activity was involved,<sup>260</sup> and the potential for harm would be lower unless the image was "more widely disseminated."<sup>261</sup>

The lack of predatory or exploitative intent further illustrates that teens

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between younger and older minors); LENHART, *supra* note 142, at 2 (stating that "[o]lder teens are much more likely to send and receive these images" with thirty percent of seventeen-year-old teenagers having received a "nude or nearly nude image on their phone").

248. See LENHART, *supra* note 142, at 2.

249. *Id.* at 8.

250. *Id.* at 2.

251. See *id.* at 6-8.

252. *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls*, Cox COMM'NS 43 (May 2009), available at [http://www.cox.com/takecharge/safe\\_teens\\_2009/media/2009\\_teen\\_survey\\_internet\\_and\\_wireless\\_safety.pdf](http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf).

253. *Id.* at 37.

254. See discussion *supra* Part I.

255. Joanna S. Markman, *In re Gault: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 140 (2007) (concluding that the juvenile justice system has become primarily concerned with the punishment, rather than the rehabilitation, of juvenile offenders).

256. See e.g., Weins & Hiestand, *supra* note 112, at 29 (proposing a sexting solution that aims to deter and rehabilitate minors).

257. Leary, *supra* note 210.

258. Weins & Hiestand, *supra* note 112, at 51, 52 n.356 (proposing that an aggravating factor in a more severe penalty or charging a minor under child pornography laws be whether material was involuntarily obtained).

259. Calvert, *supra* note 117, at 32-33, 47.

260. Humbach, *supra* note 117, at 465.

261. Calvert, *supra* note 117, at 47.

should not be subject to adult penalties if they lack the intent that child pornography statutes were designed to prohibit,<sup>262</sup> a view adopted by recent commentaries.<sup>263</sup> Teens that may legally consent to sexual relations because of age gap provisions should not face the harshness of child pornography charges when they record that legal activity.<sup>264</sup> Jurisdictions that place sexting teens alongside sex offenders who legitimately deserve to be on the sex offender registry because of their abuse and exploitation of children only dilutes the registry's importance and utility.<sup>265</sup> The registry allows residents to better understand the people living in their immediate surroundings and enables them to more thoroughly weigh the need for extra vigilance.<sup>266</sup> However, the registry becomes less useful to residents when persons on the registry differ too widely in their potential threats to the community.<sup>267</sup>

The distribution of sext images by anyone and possession of them by third parties<sup>268</sup> greatly complicates potential legislative action.<sup>269</sup> Therefore, legislatures cannot fully provide a solution to sexting relying solely on age differences.<sup>270</sup> Legislatures must consider the conduct<sup>271</sup> and intent<sup>272</sup> an individual exhibited when distributing these images. Minors who prey on other minors should not be eligible to receive the same reduced consequences for

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262. See discussion *supra* Part II.A and *infra* notes 337-41 and accompanying text.

263. See Arcabascio, *supra* note 49, at 41 (proposing that “teenage sexters who voluntarily and without coercion sext each other, without disseminating the photos to a third party, should not be charged with a crime”); Calvert, *supra* note 117, at 62 (advocating that the law should be involved “in cases of secondary, non-volitional sexting”); Levick & Moon, *supra* note 49, at 1051 (stating that a “lower-graded offense” is “preferable to child pornography charges” but arguing that “the best alternatives resist widening the net of the juvenile justice system”); Weins & Hiestand, *supra* note 112, at 52-53 (proposing statutory language that enhances sexting punishment when material was obtained involuntarily); Julie Hilden, *How Should Teens’ “Sexting”—the Sending of Revealing Photos—Be Regulated?*, FINDLAW (Apr. 28, 2009), <http://writ.news.findlaw.com/hilden/20090428.html>.

264. See Smith, *supra* note 14, at 524-25; Weins & Hiestand, *supra* note 112, at 50 n.345.

265. Richards & Calvert, *supra* note 5, at 36.

266. *Id.*

267. *Id.* at 36-37.

268. See *infra* notes 269, 277-78 and accompanying text.

269. See Julie Hilden, *Why Sexting Should Not Be Prosecuted as “Contributing to the Delinquency of a Minor,”* FINDLAW (May 13, 2009), <http://writ.news.findlaw.com/hilden/20090513.html> (stating that “[t]eens’ nonconsensual forwarding of other teens’ photos, of course, is a much harder scenario”).

270. See, e.g., Nix, *supra* note 117, at 190-92 (proposing that Utah adopt penalties that address minors’ conduct rather than solely relying on age distinctions).

271. *Id.*

272. See Nix, *supra* note 117, at 192 (advocating for a statute that looks to the intent in sending the images); cf. Calvert, *supra* note 117, at 41-42 (suggesting that civil law remedies in the form of intentional infliction of emotional distress may be used to address sexting).

minors who consent to creating or receiving such images.<sup>273</sup> Nebraska's statute, for example, contains language that addresses coercion and forwarding or unwanted distribution of sexting images.<sup>274</sup> Circumstances like these create a true victim and can potentially be a form of cyberbullying or worse.<sup>275</sup> Furthermore, the act of a minor "voluntarily" giving an image to an adult should not exempt that adult from prosecution under child pornography laws.<sup>276</sup>

State legislatures should also ensure that legislation still punishes and deters adults<sup>277</sup> from obtaining minor's sexting images and that the "marketplace" of images does not grow.<sup>278</sup> Certainly, most of us understand or are coming to understand that anything sent electronically can more quickly and easily become available to the general public.<sup>279</sup> That fact, however, should not prevent angry boyfriends, third-party high school student recipients, or child predators from facing different tiers<sup>280</sup> of consequences for distributing these images.<sup>281</sup> Nebraska's law eliminates the affirmative defense it created for individuals under nineteen if the defendant distributes the "visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant."<sup>282</sup> This provision acknowledges that some sexting is likely to occur between teenagers but does not open the market to anyone else obtaining these images.

### B. Appropriate Penalties for Sexting Teens

Sexting is not victimless.<sup>283</sup> It potentially increases the amount of child

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273. Calvert, *supra* note 117, at 33 ("legal intervention seems most necessary in cases of' a minor distributing an image without permission or a minor "preying on a much younger person"); Weins & Hiestand, *supra* note 112, at 51, 52 n.356, 53 (proposing enhanced punishment when material is obtained involuntarily and reiterating that a sexting statute should not absolve minors who remain guilty under child pornography laws).

274. NEB. REV. STAT. § 28-813.01 (Supp. 2009).

275. See *supra* note 258 and accompanying text.

276. *Id.*

277. Calvert, *supra* note 117, at 60-61.

278. See, e.g., *id.* at 62 (stating that how much a minor is harmed by sexting "depends directly on: 1) how it is used by the recipient; and 2) to whom and to how many people the recipient forwards it"); Weins & Hiestand, *supra* note 112, at 55 (examining the application of a proposed sexting bill to a situation in which a minor sells a self-image to an adult).

279. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at MM30, available at [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?\\_r=1&ref=magazine](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?_r=1&ref=magazine).

280. This is not to suggest that angry boyfriends, third-party student recipients, and child predators should face equal punishments.

281. See, e.g., Weins & Hiestand, *supra* note 112, at 50-53 (proposing a model sexting statute with aggravating factors).

282. NEB. REV. STAT. § 28-813.01 (Supp. 2009).

283. Calvert, *supra* note 117, at 4, 26-27. But see Humbach, *supra* note 117, at 466 (arguing

pornography that has continued to rise despite law enforcement efforts.<sup>284</sup> Additionally, sexting can lead to situations where teens threaten other teens to obtain the photographs, where the photographs are maliciously or deliberately distributed and teens are humiliated, or where adults actively seek out the images.<sup>285</sup> It is unlikely that states can fully deter an action that fifty-five percent of its potential participants do not view as having serious legal consequences.<sup>286</sup> State legislatures, however, can take steps to avoid the inequitable results that currently exist under their laws<sup>287</sup> and create some deterrent effect.<sup>288</sup>

1. *Content of Images.*—The prosecution of “borderline”<sup>289</sup> images in *Skumanick* illustrates the need for legislation to address the actual content of the sexting images. For example, in *Skumanick*, the prosecutor was offering the sexting teens an educational alternative to being charged under the state’s child pornography laws, but the content of the images may not have met the definition of child pornography.<sup>290</sup> The potential situation that a prosecutor would pursue charges against teens clad in underwear<sup>291</sup> illustrates the need for specific language that ensures the content does not warrant First Amendment protection.<sup>292</sup>

Professor Clay Calvert recently wrote that the question of whether borderline images are child pornography is a “threshold question [and] requires a fact-intensive inquiry.”<sup>293</sup> The key inquiry, according to Calvert, is whether the

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that protecting people from “their own youthful silliness . . . hardly seems an interest ‘of surpassing importance’”) (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)).

284. See discussion *supra* Part II.

285. See discussion *supra* Part III.A.

286. COX COMM’NS, *supra* note 252, at 43.

287. Weins & Hiestand, *supra* note 112, at 29.

288. Leary, *supra* note 14, at 42-43.

289. See Weins & Hiestand, *supra* note 112, at 8, 24-25 (stating that “the Supreme Court has left open issues regarding whether borderline materials depicting children are protected by the First Amendment”); see also Calvert, *supra* note 117, at 51-55 (discussing how different statutory language determines how an image will be defined based on its content).

290. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 645-46 (M.D. Pa. 2009), aff’d sub nom. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

291. See *id.*

292. This Note assumes that most sexting instances that are handled by law enforcement and the juvenile justice system will not be protected by the First Amendment. Determining which cases are protected is still an area of debate. See, e.g., Humbach, *supra* note 117, at 482-85 (stating that “the constitutional status of teen sexting and other autopornography remains uncertain”); Kimpel, *supra* note 113, at 338 (advocating that “we serve children better by acknowledging their rights and allowing their speech rather than silencing expressions of their sexuality”); Wood, *supra* note 7, at 177 (suggesting that “it is time for society to recognize at least a limited right to sexual privacy for minors under the mature minor standard . . . subject to the right of parents to control the upbringing of their children”).

293. Calvert, *supra* note 117, at 51.

“depiction is lascivious.”<sup>294</sup> His article points to the difficulty presented by differing definitions of child pornography under federal and state laws.<sup>295</sup> Borderline images may meet the definition of child pornography if the state requires “exhibition” as opposed to “lascivious” conduct.<sup>296</sup> As another recent law review article stated, however, lasciviousness is a question for the jury, which invites “the same problems and criticisms” as when “jurors are asked to define community standards for obscenity prosecutions.”<sup>297</sup>

In *Skumanick*, the Third Circuit Court of Appeals “appeared poised” to rule that sext images, including one exhibiting a female minor’s breasts, were protected by the students’ First Amendment rights<sup>298</sup> before reaching a narrower holding.<sup>299</sup> This type of ruling would arguably have been closer to applying the “lascivious” standard rather than an “exhibition” one.<sup>300</sup> The implications of a ruling that acknowledges a juvenile’s First Amendment right to individually take or appear in such a picture does not greatly affect the debate on punishing teens who sext but do not distribute. Individuals are generally not prohibited from viewing and documenting their own self-images.<sup>301</sup> Finding that the further distribution of most images are protected under the First Amendment presents potential problems. In *Skumanick*, some of the images discovered in the school district’s investigation were photographs of a fourteen-year-old girl who was “naked from the waist up” that were sent to a since-arrested adult male who had planned on visiting her.<sup>302</sup> Allowing minors to take and distribute the images could increase the marketplace for them and potentially prevent the state from taking action against juveniles who actively distribute these images.<sup>303</sup> The best target for the most severe prosecution in that instance, however, is the adult who was victimizing the juvenile.<sup>304</sup>

## 2. A Juvenile Court Response.—State legislatures can circumvent many of

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294. *Id.* at 52.

295. *Id.* at 53.

296. *See id.* (stating that under federal law, an image constitutes child pornography if it shows “lascivious images of the genital or pubic area, not to the breasts”). States may use language such as “exhibition” rather than “lascivious,” which increases the likelihood that a court will interpret a borderline image to be child pornography. *Id.*

297. Weins & Hiestand, *supra* note 112, at 25.

298. Shannon P. Duffy, *Panel Mulls If Teen ‘Sexting’ Is Child Pornography*, *LEGAL INTELLIGENCER*, Jan. 19, 2010, available at 2010 WLNR 1116394.

299. *See supra* notes 173-83 and accompanying text.

300. *See supra* notes 290-96 and accompanying text.

301. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. (forthcoming Dec. 2010), available at <http://ssrn.com/abstract=1553920>; cf. Kimpel, *supra* note 113, at 333 (stating that “[n]o case has addressed the absurdity of applying child pornography laws to minors’ uncoerced self-portraits”).

302. Reply Brief of Appellant at 10-11, *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (No. 09-2144), available at 2009 WL 5538636.

303. *See id.*

304. Shafron-Perez, *supra* note 103, at 449.

the inequities that have surrounded charging sexting juveniles with possession or distribution of child pornography by ensuring that the average case is resolved in juvenile court.<sup>305</sup> Recent commentaries have followed this approach.<sup>306</sup> Vermont and Utah have attempted to ensure that teens caught sexting do not face life-changing charges.<sup>307</sup> Vermont adjudicates these juveniles as delinquents.<sup>308</sup> Applying a similar philosophy, Utah charges sexting by persons seventeen and under as a misdemeanor.<sup>309</sup> Laws and bills in Arizona,<sup>310</sup> Illinois,<sup>311</sup> Kentucky,<sup>312</sup> Mississippi,<sup>313</sup> and South Carolina<sup>314</sup> would make sexting by juveniles a misdemeanor. A Rhode Island bill took a similar approach by making juvenile sexting a status offense and referring juveniles to family court.<sup>315</sup> These measures reflected the notion that regardless of the results of their actions, teens have neither the ability to completely understand their actions nor the culpability of adults or predatory minors who target others.<sup>316</sup>

At most, juveniles who voluntarily create and distribute sexually explicit images of themselves or possess analogous images of other minors voluntarily obtained from said minors should, under “average” circumstances, be adjudicated as delinquents in juvenile court.<sup>317</sup> Legislatures should also require juvenile courts to consider several other factors in sexting instances to understand the scope of the circumstances.<sup>318</sup> In Ohio, a prosecutor took this approach by implementing a program that considers (1) “whether the juvenile has any prior

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305. See VT. STAT. ANN. tit. 13, § 2802b (2010).

306. See Calvert, *supra* note 117, at 60-61; Corbett, *supra* note 235, at 6-7; Leary, *supra* note 44, at 551-52; Weins & Hiestand, *supra* note 112, at 52; cf. Arcabascio, *supra* note 49, at 42 (advocating for a maximum of a misdemeanor charge); Nix, *supra* note 117, at 192 (advocating law that allows discretion to determine misdemeanor charge “based on . . . conduct, not age”); Shaffron-Perez, *supra* note 103, at 451-52 (stating that the best proposal to address sexting is a “separate offense” that charges teens with misdemeanors).

307. Shaffron-Perez, *supra* note 103, at 452-53 n.139. But see Weins & Hiestand, *supra* note 112, at 34-37, 41-45 (arguing that Vermont and Utah have not prevented prosecutors from charging sexting juveniles under child pornography laws).

308. VT. STAT. ANN. tit. 13, § 2802b(b)(1) (2010).

309. UTAH CODE ANN. §§ 76-10-1204(1)-(4)(c), -1206(1)-(2)(c) (West, Westlaw through 2010 legislation).

310. ARIZ. REV. STAT. ANN. § 8-309 (2010).

311. H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010).

312. H.R. 57, 2010 Leg., Reg. Sess. (Ky. 2010).

313. H.R. 643, 2010 Leg., 125th Reg. Sess. (Miss. 2010).

314. H.R. 4504, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010).

315. H.R. 7778, 2010 Leg., Reg. Sess. (R.I. 2010).

316. See discussion *supra* Part II and note 254 and accompanying text.

317. See Arcabascio, *supra* note 49, at 42 (advocating for a maximum of a misdemeanor charge); Nix, *supra* note 117, at 192 (advocating law that allows discretion to determine misdemeanor charge “based on a [teenager’s] conduct, not age”).

318. See Weins & Hiestand, *supra* note 112, at 48 (advocating a “low, base-level juvenile charge, with aggravating factors for more serious behaviors”).

sexual offenses;” (2) whether “force or illicit substances were used;” (3) whether the juvenile had sexted and been through the program before; and (4) whether the “victim or law enforcement[’s]” concerns regarding the diversionary program had been taken into account.<sup>319</sup>

In more severe cases, the juvenile could be waived to criminal court<sup>320</sup> if the juvenile repeatedly coerced or threatened other minors to sext or engage in sexual acts while documenting that activity.<sup>321</sup> In that scenario, a “waiver to criminal court” would ensure that the level of punishment meets the severity of the crime – something more severe than “juvenile courts properly are empowered to impose.”<sup>322</sup> Aside from the abovementioned Ohio factors, state sexting statutes should only consider registration if the actions are severe enough. For example, the Adam Walsh Act places adjudicated teenagers on the sex offender registry if their actions closely parallel aggravated sexual abuse.<sup>323</sup> Aggravated sexual abuse occurs when a person engages in a sex act with another by force, by threat, rendering the person unconscious or through involuntarily drugging, or when a person engages in a sex act with a person under twelve years old.<sup>324</sup> Even in rare and severe cases, the court should have discretion to examine the totality of the circumstances to find the most equitable outcome for all parties.<sup>325</sup> Under this scheme, it appears more appropriate to seek enhanced penalties because of a significantly large age gap between the teens<sup>326</sup> and evidence of exploitation.<sup>327</sup>

3. *Question of Prosecutorial Discretion.*—Prosecutors currently have less severe statutes than child pornography laws at their disposal that could address sexting if state legislatures choose not to pass sexting legislation.<sup>328</sup> Potential options include laws covering obscenity,<sup>329</sup> “disorderly conduct, harassment, and

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319. Heck, *supra* note 4, at 29.

320. See Weins & Hiestand, *supra* note 111, at 52 n.356, 55 (arguing that states’ waiver laws may require statements that sexting cases should only be brought in juvenile court but stating that sexting laws should not lessen punishment for minors that create, possess, or distribute child pornography).

321. Heck, *supra* note 4, at 29.

322. ZIMRING, *supra* note 44, at 140.

323. See Bowater, *supra* note 68, at 828, 846-50 (discussing the Adam Walsh Act and criticizing it for requiring juveniles to register for sex offenses when “convicted” in juvenile court).

324. U.S. DEP’T OF JUSTICE, JUVENILE OFFENDERS REQUIRED TO REGISTER UNDER SORNA: A FACT SHEET, available at [http://www.ojp.usdoj.gov/smart/pdfs/factsheet\\_sorna\\_juvenile.pdf](http://www.ojp.usdoj.gov/smart/pdfs/factsheet_sorna_juvenile.pdf) (last visited Oct. 3, 2010).

325. Weins & Hiestand, *supra* note 112, at 29, 52-53 (cautioning against placing juveniles on the sex offender registry “given the gravity of the consequences”).

326. See Hilden, *supra* note 263 (stating that teens close in age should have a “safe harbor” to send sext messages and not be deemed criminals).

327. Calvert, *supra* note 117, at 33.

328. Richards & Calvert, *supra* note 5, at 13; see also Arcabascio, *supra* note 49, at 25-27 (discussing prosecutorial discretion); Leary, *supra* note 44, at 551-55 (arguing for a juvenile court response that is based on “structured prosecutorial discretion”).

329. Corbett, *supra* note 235, at 7.

stalking,”<sup>330</sup> “annoying communication,”<sup>331</sup> and cyberbullying.<sup>332</sup> Using these statutes to address sexting would allow states to take action against teens who sext without affixing the inherent sexual predator label that child pornography statutes carry.<sup>333</sup> Furthermore, it would prevent minors who created or possessed sexting images without coercion from being placed on the sex offender registry. Examining the sexting cases thus far, however, suggests that a specific statute would serve both the community and juveniles better than potentially unpredictable prosecutions.<sup>334</sup>

4. *A Sexting-Specific Statute.*—The policy implications surrounding sexting require serious consideration and deliberation.<sup>335</sup> The potential ramifications for juveniles, however, are too dramatic and long-lasting for legislatures not to provide guidance.<sup>336</sup> Punishing juvenile offenders as “stereotypical sexual predators” creates a perception that the juvenile offenses are “more dangerous and serious than they actually are.”<sup>337</sup> Protecting the victims of adult offenders and other circumstances surrounding punishing child pornographers both firmly justify harsher penalties.<sup>338</sup> Adult sex offenders typically use force to manipulate, coerce, or kidnap children.<sup>339</sup> The adults’ intent is solely to exploit these children.<sup>340</sup> In contrast, sexting among juveniles tends to lack that degree of coercion.<sup>341</sup> Furthermore, prosecutors are still threatening to charge children and teenagers under child pornography statutes for sexting<sup>342</sup> nearly two years after

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330. Richards & Calvert, *supra* note 5, at 13.

331. See FLA. STAT. ANN. § 784.048 (West, Westlaw through 2010 legislation). This statute criminalizes the act of cyberstalking and defines it as engaging “in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.” *Id.*

332. Calvert, *supra* note 117, at 38-40, 58-59.

333. Richards & Calvert, *supra* note 5, at 13.

334. See Shafron-Perez, *supra* note 103, at 451 (addressing Colorado’s reliance on prosecutorial discretion and the potential for prosecutorial abuse).

335. See, e.g., Jon Seidel, ‘Sexting’ Bill Headed for Study, MERRILLVILLE POST-TRIB., Feb. 17, 2010, at 9, available at 2010 WLNR 3336671 (discussing Indiana lawmakers’ postponing the passage of a sexting bill until policy considerations are further studied).

336. See, e.g., Kristen Schorsch, *Sexting May Spell Court for Children: Kids Trading Photos Seen as Child Porn, Which Is a Felony*, CHI. TRIB., Jan. 29, 2010, at 17, available at 2010 WLNR 1912762 (discussing a twelve-year-old boy and thirteen-year-old girl who had been supposedly charged in Indiana with child exploitation and possession of child pornography after trading nude images of themselves on their cell phones two years after stories of charging juveniles with felonies for sexting became widespread).

337. ZIMRING, *supra* note 44, at 116.

338. Corbett, *supra* note 235, at 6.

339. *Id.*

340. *Id.*

341. *Id.*

342. See, e.g., Schorsch, *supra* note 336.

sexting entered the mainstream media's conversation.

If sent between two consenting teenagers, sexting is not just another version of the First Amendment child pornography exception.<sup>343</sup> *Ferber*'s rationale may not be applicable if the average sext message does not document a record of abuse.<sup>344</sup> The rationale for taking any type of action against teenagers for sexting, therefore, must reside in the notion that the government is acting to protect a teen from victimizing and harming himself – even if he does not realize it – and protect society from harm.<sup>345</sup>

Teen sexting can result in humiliation and exploitation.<sup>346</sup> While some sexting teens may find that no repercussions result from their actions,<sup>347</sup> the state's parens patriae role gives each state the ability to protect teens.<sup>348</sup> Sexting images are not necessarily likely to "decrease the market for traditional child pornography."<sup>349</sup> The fact that teenagers may initially forward or send the images in a non-commercial context does not mean the images will not enter a commercial setting or increase demand.<sup>350</sup> Furthermore, accidentally sending them to an unknown person is not the only way pedophiles can receive these images.<sup>351</sup> For example, sexting images that teenage girls sent their boyfriends ended up on the Internet when another teenager acquired the images and sold a DVD of the

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343. Calvert, *supra* note 117, at 47-48.

344. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) ("*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were 'intrinsically related' to the sexual abuse of children in two ways" related to the "permanent record of a child's abuse" and the state's interest in closing the child pornography market) (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)); Arcabascio, *supra* note 49, at 24 (stating that "where no crime occurs in the taking of the picture, the distribution argument cannot stand alone and must fail" when charging child pornography); Calvert, *supra* note 117, at 47-48 (stating that the initial "sexting image" is generally not a record of abuse and the only support from *Ferber* for "applying child pornography laws to instances of sexting" is because the images are permanent records that can be distributed).

345. See Calvert, *supra* note 117, at 48; Leary, *supra* note 14, at 6; Weins & Hiestand, *supra* note 112, at 30.

346. See Calvert, *supra* note 117, at 4 (stating that sexting "stretch[es] beyond sexual exploitation and embarrassment to commercial exploitation and even death").

347. See COXCOMM'S, *supra* note 252, at 38 (reporting that ninety percent of "sext senders" stated that none of the "bad things" listed in the poll had occurred when they had sent a sext message).

348. Leary, *supra* note 14, at 26-27.

349. See Shafron-Perez, *supra* note 103, at 449 n.113.

350. Kimpel, *supra* note 113, at 321 (stating that "the market rationale does justify the prosecution of children for consuming child pornography produced by a third party because children consuming child pornography do create an increased market demand").

351. Shafron-Perez, *supra* note 103, at 449 (stating that pedophiles are unlikely to possess sexting images unless a minor "incorrectly" and "coincidentally" dials the phone number of a pedophile).

images.<sup>352</sup> Once located in a digital form, the image has access to the Internet, which “allows for unprecedented voyeurism, exhibitionism and inadvertent indiscretion.”<sup>353</sup> And on the Internet, “these images . . . make their way to the newsgroups, peer-to-peer file-sharing networks, and email of those who use these images to validate their own sexual proclivities for children.”<sup>354</sup>

The rationale for a distinction punishing juveniles and not adults, or on a different level than adults, is not new.<sup>355</sup> As Justice Kennedy recently restated in *Graham v. Florida*, “[i]t remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’”<sup>356</sup> The status of being a juvenile results in different prohibitions that do not apply to adults.<sup>357</sup> We do not allow juveniles to drink alcohol before they turn twenty-one years old.<sup>358</sup> We do not allow juveniles to purchase cigarettes before they turn eighteen years old.<sup>359</sup> As a society, we have recognized that allowing juveniles to drink or smoke before they have matured harms them in ways we wish to avoid. Conversely, many states avoid prosecuting teens who engage in sexual activity<sup>360</sup> and allow certain sexual activity between teenagers.<sup>361</sup> Rationales exist for regulating these activities as well. Certainly, negative consequences exist for teens who become pregnant before they are ready to become parents. The punishable difference between teens sexting and engaging in sexual activity may be due to a lack of psychological drive that exists for teens to document their sexual activity.<sup>362</sup> Teenagers do not have the same biological urge to sext that they do with regard to sexual activity. Therefore, controlling sexting is more closely aligned to the rationales of not allowing teens to smoke or drink before a certain age.<sup>363</sup> It is a right they eventually gain but not one they possess as

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352. Calvert, *supra* note 117, at 2.

353. Rosen, *supra* note 279.

354. Leary, *supra* note 210.

355. See Weins & Hiestand, *supra* note 112, at 27 n.220 (explaining that sexting could be a status offense because it involves an activity “which is legal for an adult”).

356. *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

357. See Weins & Hiestand, *supra* note 112, at 27 n.220.

358. Leary, *supra* note 44, at 544 n.246.

359. Cf. *id.* (stating that we do not decriminalize illegal narcotics simply because a large number of minors ingest them).

360. See Olszewski, *supra* note 205, at 706 (stating that “[s]exual conduct involving persons close in age is either non-criminal or punished at a substantially reduced level” in a majority of states).

361. See Calvert, *supra* note 117, at 48-49 (discussing statutory rape laws).

362. But see Levick & Moon, *supra* note 49, at 1038-39 (stating that “[s]exting is the result of a convergence between the well-recognized adolescent need for sexual exploration and new technology that allows teens to explore their sexual relationships” and “technology is an inseparable part of their lives”).

363. Leary, *supra* note 44, at 544 n.246.

teens.<sup>364</sup>

States addressing sexting juveniles should create a specific and separate statute.<sup>365</sup> It is not uncommon for a state statute to punish minors less than adults for the same conduct. In Indiana, for example, a minor attempting to sneak into a bar with a fake form of identification will face a C misdemeanor charge under the false statement of age statute,<sup>366</sup> which the legislature recently increased from an infraction.<sup>367</sup> An adult possessing a fake ID would face a class B misdemeanor or a D felony charge if he knowingly filled out false information to obtain the identification.<sup>368</sup> Although punishments under child pornography laws are justified to protect children from pedophiles and other sexual abusers,<sup>369</sup> this rationale does not support applying the same punishments to sexting teens.<sup>370</sup> Being a “‘juvenile’ carries a shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults,” and more limited detention.<sup>371</sup>

A sexting statute that carries a less ominous title would help to ensure that anyone gaining access to the juvenile’s past history, even if expunged, would not assume that the juvenile belongs in the same category as the worst offenders. Furthermore, the state must have the ability to punish the worst offenders with more serious crimes while allowing the “typical” sexting case to be handled by the juvenile court.<sup>372</sup> A primary focus of the statute may be to look at the intent of the minor and number of times a minor has dealt with the justice system.<sup>373</sup> Penalties based simply on “hoarding” or the number of images possessed could end in more severe penalties than is necessary.<sup>374</sup> For example, a statute that creates an additional penalty out of possessing ten images<sup>375</sup> may unfairly target a teenage couple that, however inappropriate, has engaged in sexting over a period of time if it does not address the intent of the minors. Furthermore, a penalty increased for a first-time offense because material was sent to five people, rather than just three to four, seems like an arbitrary cutoff.<sup>376</sup> In the fickle world

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364. See Leary, *supra* note 14, at 44.

365. Weins & Hiestand, *supra* note 112, at 48-52. But see Levick & Moon, *supra* note 49, at 1036 (describing law enforcement’s involvement in sexting as a “disturbing trend”).

366. IND. CODE § 7.1-5-7-1(a) (2010).

367. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 938 (2009).

368. IND. CODE § 9-24-16-12.

369. Richards & Calvert, *supra* note 5, at 35.

370. See *supra* notes 245-54, 337-41 and accompanying text.

371. *In re M.D.N.*, 493 N.W.2d 680, 683 (N.D. 1992).

372. See, e.g., Weins & Hiestand, *supra* note 112, at 50-53 (advocating that the highest charge brought against juveniles for sexting be “a felony in juvenile court” and that a state may wish to prevent waiver to criminal court).

373. See *id.* at 51.

374. *Id.* at 51.

375. *Id.*

376. But see *id.*

of high school relationships, a teenager could have five “long-term” relationship over the course of five months, yet still be charged with a more severe penalty for sending explicit images to his or her five significant others over the course of a year. Looking at the intent of the sender might more accurately reflect a just response.<sup>377</sup> For instance, a teenager who has sent ten unrequested images is probably more deserving of punishment than the teenage couple.<sup>378</sup> States should also have the option of punishing minors who repeatedly harass and threaten other minors but fail to obtain explicit material.<sup>379</sup>

The purpose of ensuring that a sexting statute relegates nearly all sexting instances to juvenile court is magnified as states become compliant with SORNA.<sup>380</sup> The possibility of placing juveniles on sexual offender registries, even for a short period of time,<sup>381</sup> leaves much less hope that a juvenile could be rehabilitated.<sup>382</sup> The federal guidelines take steps to require adjudicated juvenile delinquents to register only under more rare and egregious circumstances.<sup>383</sup> SORNA, however, does not create any exception for juveniles prosecuted as adults.<sup>384</sup> Two states, New York and North Carolina, currently permit sixteen- and seventeen-year-olds to be tried as adults.<sup>385</sup> Where states have made sexting a misdemeanor but have not ensured that cases are brought in juvenile court or are not charged under child pornography statutes, a sexting offense may still lead to registration on the sex offender list in compliance with SORNA. Possession, creation, or distribution of child pornography, without any age clarifiers, is a registerable offense under SORNA.<sup>386</sup> Given this statutory scheme, the minority

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377. *But see id.* at 51 n.350 (stating the authors “see no reason that [bright line numerical rules] are particularly inappropriate here”).

378. Compare Nix, *supra* note 117, at 191, with Weins & Hiestand, *supra* note 112, at 30-31 (proposing examples where a teen sends unrequested and presumably unwanted images compared to a scenario where a teenage couple potentially faces charges for exchanging images).

379. See Richards & Calvert, *supra* note 5, at 13 n.47; see also Arcabascio, *supra* note 49, at 29-31 (discussing cyberbullying laws).

380. See *supra* notes 72-78 and accompanying text; see also Leary, *supra* note 44, at 515-18 (discussing SORNA and possible implications when addressing sexting); Levick & Moon, *supra* note 49, at 1049-50 (same).

381. See Rosen, *supra* note 279.

382. Smith, *supra* note 14, at 535-40.

383. See U.S. DEP’T OF JUSTICE, *supra* note 324; see also Leary, *supra* note 44, at 515-17 (discussing SORNA and noting that its construction does not require juveniles to register for all sex offenses but only for “particularly serious sexually assaultive crimes”).

384. OFFICE OF JUSTICE PROGRAMS, *supra* note 72, at 16. But see Leary, *supra* note 44, at 517 (discussing SORNA and arguing that the question is not “whether a state allows juvenile sex offender registration, but whether it does so for child pornography adjudications” in juvenile court). Professor Leary further states, however, that her structured prosecutorial discretion proposal limits prosecutions to juvenile court. *Id.* at 519 n.135.

385. See Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1445 (2008).

386. OFFICE OF JUSTICE PROGRAMS, *supra* note 72, at 20.

of states allowing prosecution of sixteen or seventeen-year olds as adults will face the possibility of adding two seventeen-year-old high school sweethearts to the registry even after the creation of a reduced-penalty sexting statute.

The following proposed sexting statute is molded from recent bills passed or proposed by state legislatures, as well as recent commentaries on sexting.<sup>387</sup> Its design attempts to ensure that consensual sexting is addressed within the juvenile justice system and works to punish more egregious conduct. It states:

#### PROHIBITION ON MINORS ELECTRONICALLY DISSEMINATING IMPROPER MATERIAL

It is not a violation of this statute if a minor<sup>388</sup> took reasonable steps to delete, destroy, or eliminate the visual depiction. This is not applicable to a minor who sends the depiction with embedded code, software, or other electronic means that deletes, destroys, or eliminates the visual depiction meant to harass, coerce, or threaten another minor.

This statute does not cover<sup>389</sup> possession, creation, or distribution of images or depictions by any person eighteen years of age or older.

- (a) A minor may not knowingly use electronic devices or computers<sup>390</sup> to send or distribute to another minor an image, photograph, or other depiction of himself or herself in a state of nudity or engaged in

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387. The statutes and bills included and looked to for the model language include FLA. STAT. ANN. § 827.071 (West, Westlaw through 2010 legislation); NEB. REV. STAT. § 28-813.01 (Supp. 2009); VT. STAT. ANN. tit. 13, § 2802b (2010); H.R. 5533, 2010 Leg., Reg. Sess. (Conn. 2010); H.R. 1335, 2010 Leg., 112th Reg. Sess. (Fla. 2010); H.R. 4583, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2010); H.R. 57, 2010 Leg., Reg. Sess. (Ky. 2010); H.R. 1357, 2010 Leg., 36th Reg. Sess. (La. 2010); H.R. 643, 2010 Leg., 125th Reg. Sess. (Miss. 2010); H.R. 7778, 2010 Leg., Reg. Sess. (R.I. 2010); H.R. 4504, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2010); Legis. B. 285, 101st Leg., 1st Reg. Sess. (Neb. 2009); Assemb. B. 4069, 213th Leg., 2d Ann. Sess. (N.J. 2009); S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

388. Legislators may find it necessary to find compliance between the state's age of consent law and its sexting law. *See Weins & Hiestand, supra* note 112, at 50 n.345 (citing Smith, *supra* note 14, at 524-25).

389. This Note and proposed statute do not address images created, obtained, and distributed by minors for commercial purposes. Legislators, however, will likely need to address the issue in whatever manner they deem appropriate. *Compare Weins & Hiestand, supra* note 112, at 32-33 nn.253-58 (detailing difficulty of determining criminal justice response where commercial purposes were involved but concluding that many minors will benefit from the rehabilitative resources of the juvenile justice system and that cases should be determined on an individual basis), *with Shafron-Perez, supra* note 103, at 435 n.30 (stating that “[t]he author strongly believes that any person, including a minor, who creates sexually explicit material with the use of minors for the purposes of profit should be charged with violations of child pornography laws”).

390. Weins & Hiestand, *supra* note 112, at 50 n.346.

sexually explicit conduct.

- (b) A minor may not possess an image, photograph, or other depiction of another minor in a state of nudity or engaged in sexually explicit conduct.
- (c) A minor who knowingly, voluntarily, and without malicious intent possesses, transmits, or distributes an image, photograph, or other depiction of himself or herself, or of another minor, at least thirteen years of age, in a state of nudity or in sexually explicit conduct will be adjudicated to the juvenile diversionary program.
- (d) Offenders of subsection (c) will be adjudicated delinquent and face additional penalties if the minor has
  - i. been adjudicated delinquent under this section before;
  - ii. distributed depictions of other minors;
  - iii. created or transferred depictions in order to humiliate another minor;<sup>391</sup>
  - iv. exhibited malicious intent; or
  - v. distributed more than five unrequested images.
- (e) Minors adjudicated delinquent under subsection (c) and not waived to criminal court will have their records expunged upon their eighteenth birthday.<sup>392</sup>
- (f) A minor adjudicated under this section may be waived to criminal court if he or she has previously been adjudicated two or more times under this statute and has a prior unrelated sexual offense.
- (g) Minors adjudicated under this section in juvenile court shall not be charged under the state's child pornography or obscenity laws.<sup>393</sup>
- (h) Minors adjudicated under this section in juvenile court shall not face

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391. A fine line may exist between an intent to humiliate and malicious intent. It is under these "cyberbullying" circumstances where an inquiry into the number of distributions made might indicate a more malicious intent versus a more isolated, immature bullying incident.

392. See Levick & Moon, *supra* note 49, at 1047-49.

393. See *supra* notes 372-79 and accompanying text; see also Weins & Hiestand, *supra* note 112, at 52-54 (advocating for provision that exempts teens adjudicated for sexting from being prosecuted under the state's child pornography laws).

registration “in the state’s registration program.”<sup>394</sup>

- (i) This statute does not cover, replace, or prevent any prosecution of a minor for images created, transferred, possessed, or obtained
  - i. through
    - i. threats;
    - ii. coercion; or
    - iii. involuntary means;
  - ii. with malicious intent.
- (j) This statute does not prevent the prosecution of a minor for willfully, maliciously, or repeatedly attempting to obtain an image, photograph, or other depiction of another minor through coercion or threats, even if unsuccessful.<sup>395</sup>

**Diversionary program.** The adjudication alternative program shall be restricted to a person under eighteen years old who is in violation of sections (a)-(d), does not have a prior sexual offense, did not use coercion, “force or illicit substances,” and is a first- or second-time offender under this statute.<sup>396</sup> Additionally, concerns of law enforcement and the victim should be taken into account.<sup>397</sup> The education portion will include the legal ramifications of sexting, the social impact it can have on their lives, as well as ten eight-hour days of community service. Third-time offenses shall be misdemeanors in the juvenile court<sup>398</sup> and subject to the appropriate penalty.<sup>399</sup>

**Definitions.** Under this statute, nudity is defined as “lascivious exhibition of the genitals or pubic area of any person.”<sup>400</sup> Sexually

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394. Weins & Hiestand, *supra* note 112, at 53-54 (cautioning against adding juvenile sexters to the state’s sex offense registry).

395. See Richards & Calvert, *supra* note 5, at 13 n.47 (citing FLA. STAT. ANN. § 784.048 (West, Westlaw through 2010 legislation)).

396. Heck, *supra* note 4, at 28-29.

397. *Id.* at 29.

398. Weins & Hiestand, *supra* note 112, at 52.

399. If obtained voluntarily, this penalty would ideally be based on some form of an escalating home detention penalty with a prohibition on accessing the Internet and having a cell phone with texting ability. For example, a third offense might involve a ten-day home detention with no access to the Internet or a cell phone that could text, while a fourth offense could require a thirty-day home detention with no access to the Internet or a cell phone that could text. See, e.g., Levick & Moon, *supra* note 49, at 1052-53.

400. See Calvert, *supra* note 117, at 53 (citing the federal definition of child pornography at 18 U.S.C. § 2256(2)(A)(v) (2006)).

explicit conduct “means actual or stimulated (i) sexual intercourse, including genital-genital, oral genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; [or] (iv) sadistic or masochistic abuse.”<sup>401</sup>

5. *Educating Teens and Parents.*—Finally, parents and educators must do more to ensure that juveniles are aware of the consequences that may result from their actions.<sup>402</sup> Successfully educating teens and their parents alleviates the need for any state action.<sup>403</sup> Parents can preemptively act by increasing their supervision and control over their children’s digital behavior.<sup>404</sup> The ultimate role parents take must involve more than occasionally talking to their children or rifling through their teens’ cell phone pictures. Teens are no less likely to engage in sexting when their parents actively monitor their cell phones’ content.<sup>405</sup> Teens, however, cannot enter into a cell phone contract without a parent’s consent, and parents have the ability to limit the features available on cell phones.<sup>406</sup> At least one survey has shown that reducing a cell phone’s texting abilities appears to decrease the likelihood that a teen will send sext messages.<sup>407</sup>

Additionally, schools should make students aware of the consequences of sexting.<sup>408</sup> Schools could prohibit images causing substantial school disruption<sup>409</sup> should courts find that teens have a First Amendment right to send and receive certain images<sup>410</sup> or that these images are “neither obscene nor amount to child pornography.”<sup>411</sup> Furthermore, schools can educate students on the dangers of sexting.<sup>412</sup> Teens adjudicated delinquent should also attend classes that primarily focus on the legal implications as well as the non-legal implications of sexting.<sup>413</sup>

It is not clear whether independent educational sources of information would be as effective. New Jersey, for example, had proposed to place informational packets in purchased cell phones.<sup>414</sup> It is doubtful, though, that inserting these

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401. 18 U.S.C. § 2256(2)(A) (2006).

402. Leary, *supra* note 44, at 559-63.

403. *Id.*

404. Calvert, *supra* note 171, at 34-35.

405. LENHART, *supra* note 142, at 10.

406. Corbett, *supra* note 235, at 7.

407. Cf. LENHART, *supra* note 142, at 10 (observing that only nine percent of teens who engaged in sexting had parents who restricted their cell phones’ text messaging capabilities).

408. Meacham, *supra* note 1.

409. Calvert, *supra* note 117, at 34-35.

410. See *supra* notes 292-303 and accompanying text.

411. Calvert, *supra* note 117, at 36.

412. See H.R. 1115, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010) (a bill that would allow schools to offer education regarding sending “sexually suggestive or explicit material”); see also Calvert, *supra* note 117, at 40 n.195 (referencing Indiana law requiring that students learn about cyberbullying).

413. S.B. 1121, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

414. Assemb. B. 4070, 213th Leg., 2d Ann. Sess. (N.J. 2009).

packets with cell phone sales, regardless of how edifying they might be, would make a significant impression on juveniles or their parents. If placed with the manual materials, the packets would be ineffective because most people know how to use a cell phone without consulting a manual. If placed with the receipt, the packets would be ineffective because purchasers tend to set receipts aside. In either scenario, parents are likely to overlook potentially valuable educational materials. The television network MTV, however, has created an educational campaign called “A Thin Line” that addresses “sexting, cyberbullying, and digital dating abuse.”<sup>415</sup> It is unclear whether the campaign has made measurable progress,<sup>416</sup> but ultimately, society’s answer to sexting will require a multifaceted approach utilizing both public and private efforts.<sup>417</sup>

### CONCLUSION

States currently have the opportunity to address sexting meaningfully as they work to become compliant with the Adam Walsh Act. The history of our juvenile justice system has primarily relied on rehabilitation, a policy justification that can continue when addressing sexting. Over the past several years, juveniles have found themselves in various forms of legal trouble as they have faced prosecution under child pornography laws for recording and often sending what can seem like legal acts. The Supreme Court has struck down certain child pornography laws, however, on the basis that the perpetrators have not recorded an actual crime or created a specific victim.

Nevertheless, states should deter sexting because it is in a state’s interest to ensure that sexual images depicting minors do not proliferate as the Internet and cell phone communications continue to advance. But teenagers, who are by nature exploring their sexuality, should not face the life-altering prospect of ending up on a sex offender registry for an ill-advised, hormone-driven mistake.

For the vast majority of sexting incidents, the solution should be to continue in the tradition of the juvenile court system and focus on rehabilitation. Focusing on the rehabilitation approach ensures that teens who sext will receive the necessary education and treatment for their offenses without having their lives turned upside down in the process. Additionally, although this approach prevents a teen from facing the same consequences as an adult predator, it still allows states to deter this undesirable behavior by allowing some form of punishment. It also gives parents an incentive to actively educate, monitor, and control their children’s activities. In conclusion, a pragmatic and moderate step taken by state legislatures in addressing sexting will provide states an option to address sexting that neither condones nor takes the most egregious step of charging shortsighted or immature juveniles under child predator laws.

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415. *MTV Launches ‘A Thin Line’ To Stop Digital Abuse*, MTV.COM (Dec. 3, 2009, 9:17 A.M.), <http://www.mtv.com/news/articles/1627487/20091203/story.jhtml>.

416. Arcabascio, *supra* note 49, at 28-29.

417. See, e.g., Calvert, *supra* note 117, at 32-42 (discussing multiple legal and non-legal ways of addressing sexting).









